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Supreme Court, U.S.
FILED
MAY 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM 1986

WILLIAM B. TABLER AND
DOVER ELEVATOR COMPANY,
PETITIONERS

v.

MARY L. WALLACE, ET AL
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

Hon. Ronald L. Green
BOEHL STOPHER GRAVES & DEINDOERFER
444 West Second Street
Lexington, Kentucky 40508
Counsel of Record

Hon. Robert H. Measle
FOWLER MEASLE & BELL
4-A Citizens Bank Square
Lexington, Kentucky 40507
Counsel for Petitioners

10 SPP

QUESTION PRESENTED

Whether the failure of a state's highest court to abide by its own rules of procedure and enforce the statutes of that state violate a litigant's right to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

PARTIES TO THE PROCEEDING

The Petitioners are William B Tabler and Dover Elevator Company. The Respondent is Mary L. Wallace, Administratrix of the Estate of William Wallace, and Mary L. Wallace, individually. The Petitioner, Dover Elevator Company has no subsidiaries or affiliates, but is wholly owned by Dover Elevator International, Inc., which in turn is owned by Dover Corporation.

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In the Supreme Court of the United States

OCTOBER TERM 1986

WILLIAM B. TABLER AND
DOVER ELEVATOR COMPANY,
PETITIONERS

v.

MARY L. WALLACE, ET AL
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

The petitioners, William B. Tabler and Dover Elevator Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Kentucky Supreme Court rendered on November 21, 1985.

OPINIONS RENDERED BELOW

The opinions of the Court of Appeals and Kentucky Supreme Court are reproduced in the Appendix hereto for the convenience of the Court. Likewise, the order denying the petition for rehearing and modification of the dissenting opinions are so reproduced. The official opinion of the Kentucky Supreme Court is reported at *704* S.W.2d. *179.*

JURISDICTION

1. The opinion of the Kentucky Supreme Court for which review is sought was rendered on November 21, 1985.

2. A petition for rehearing was timely filed and was denied by the Kentucky Supreme Court on February 27, 1986.

3. Jurisdiction to review the opinion of the Kentucky Supreme Court is conferred by 28 U.S.C. Chapter 1257(3).

CONSTITUTIONAL, STATUTORY & PROCEDURAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution, Kentucky Civil Rules of Procedure 24.03, 46 and 76.12 (IV), and Kentucky Revised Statute 418.070 are reproduced at App., *infra*. 85a-87a.

STATEMENT

At issue in the Kentucky Supreme Court was whether the Respondent was barred from attacking the constitutionality of a statute by the rules promulgated by the same Court and the statute properly enacted by the Kentucky legislature. The majority of the seven member Court "expressed no opinion", App. 5a, as to the effect of the rules, while three Justices in the dissenting opinion described this failure to respond as follows:

> Another facet of the nonpreservation issue is the deliberate flaunting of a legislative mandate . . . Undoubtedly, this passing over of a failure to

> follow the statute or rule in the trial court is due to the fact that there cannot be any reasonable explanation why the proposition (constitutionality of the statute) can be considered by this Court.

App. 48a and 50a. While it is admitted that the Kentucky Supreme Court could construe its rules in any manner it chooses, the arbitrriness of its action arises from its failure to do so.

1.*The Applicable Rules.* In 1969 the Kentucky high court promulgated a rule which reflects a policy established by the Kentucky legislature in Ky. Rev. Stat. 418.070. See App. 86a. Under Kentucky procedure a litigant is precluded from attacking the constitutionality of a statute unless the litigant notifies the Kentucky Attorney General of his intent to do so prior to entry of judgment. No such notice was given by Respondent until she served the Attorney General with her notice of appeal which does not indicate that a constitutional attack is being made. App. 79a. The Attorney General filed a statement declining to intervene. App. 82a. As noted by Justice Stephenson in the dissenting opinion: "No doubt he made the quaint assumption that the Court of Appeals would follow the statute, the cases based thereon and our rules." App. 49a.

The procedure set forth in CR 24.03 in effect implements the policy of the statute, and uses mandatory, rather than permissive language with regard to its effect. Both the statute and rule have been consistently applied by the Kentucky Courts, and *there*

exist no exceptions to its operation. See Dewey v. *Allinder*, 469 S.W.2d 548, 550 (1971); *Jefferson County Fiscal Court* v. *Trager*, 300 Ky. 606, 189 S.W.2d 955 (1945). Since Kentucky modified its judiciary in 1976,[1] the Kentucky Supreme Court has not even accepted review of a case applying the statute and rule. The intermediate Kentucky Court has considered the proposition on two occasions, however, and in both instances has held that a failure to comply bars any claim of unconstitutionality. *McNeal* v. *Armour & Co.*, 660 S.W.2d 957 (Ky. Ct. App. 1983); *Blake* v. *Woodford Bk, & Tr. Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

Equally repugnant to the Fourteenth Amendment is the Court's failure to consider the application of its rules relating to preservation of error. While the rules are in large part created by decisional law, the Kentucky Supreme Court has embodied the principles in its Rules of Court. In CR 46 the Court provides that an objection shall be sufficient to preserve error where exceptions had theretofore been required. Likewise, the Court has provided that each appellant's brief state whether the issue being raised was preserved. CR 76.12(iv).

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[1] Since the adoption of Ky. Const. 115 which became effective in 1976, the Commonwealth of Kentucky has utilized a two-tiered appellate structure, the highest Court being the Supreme Court. Prior thereto, the high Court of Kentucky was known as the Court of Appeals.

The Kentucky Court's decisional law has consistently applied this rule and enforced the same in the past. *Akers* v. *Floyd County Fiscal Court*, 556 S.W.2d 146 (Ky. 1977); *Bissett* v. *Goss*, 481 S.W.2d 71 (Ky. 1972); *Pittsburgh & Midway Coal Mining Co.* v. *Rushing*, 456 S.W.2d 816 (Ky. 1969). Likewise, the Court has consistently held that the mere fact that the appeal presents a constitutional challenge based on equal protection does not affect the application of the rule. City of *Bowling Green* v. *Gasoline Marketers, Inc.*, 514 S.W.2d 685 (Ky. 1974); *Fitzpatrick* v. *Crestfield Farm, Inc.*, 582 S.W.2d 44 (Ky. Ct. App. 1978). As noted above, the Kentucky Supreme Court did not decide to apply or create an exception to its rule, but rather simply chose not to apply it in this case. Likewise, the dissenting opinion makes it clear that the proper application of the rule would have been outcome determinative.

2. *Proceedings Below.* The Respondent filed this action seeking recovery for wrongful death, naming the Petitioners as defendants, as well as another party who has not been involved in the appeal. The Petitioners moved the trial Court for summary judgment on the ground that the claim was barred by the applicable statute of limitations,[2] which was granted. App. 74a. The Respondent's response to said motion

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[2] The constitutionality of the statute of limitations is not at issue on this petition, as the Kentucky Supreme Court invalidated it on state grounds.

did not suggest that the statute in question was unconstitutional, nor was any type of notice given to the Attorney General of Kentucky of Respondent's intent to challenge the validity of the statute in respone to said motion. Respondent filed a notice of appeal from the judgment of the trial Court, which was mailed to the Attorney General, but there is no evidence that the Attorney General was apprised of the nature of the attack. App. 82a. The first constitutional attack on the statute was made in Respondent's brief, and the defense at issue herein was raised at that time by Petitioners. The Court of Appeals found the statute to be violative of equal protection, App. 51a, and in a footnote simply stated that it found the preservation issues to be unpersuasive.

The Petitioners filed a motion with the Kentucky Supreme Court requesting review,[3] which set forth the procedural defenses as well as the constitutional issues as basis for review. App. 64a. The motion was granted, App. 73a, and all issues briefed. For purposes of oral argument the within cause was consolidated with another wherein the Court's rules had been complied with by counsel. App. 2a.

The Kentucky Supreme Court rendered its Opinion on November 21, 1985, and treated the question of compliance with its rules with the phrase "express

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[3]Review of an opinion of the Kentucky Court of Appeals by the Kentucky Supreme Court is discretionary. CR 76.20(1).

no opinion." App. 5a. Three of the seven Justices dissented on the ground that the majority arbitrarily disregarded the rules at issue herein. App. 26a, 47a. The Petitioners thereafter filed a petition for rehearing, squarely placing before the Court the ramifications the Fourteenth Amendment may have on its decision to ignore the rules at issue. App. 30a, which was denied. App. 47a.

REASONS FOR GRANTING THE PETITION

The Kentucky Supreme Court has implicitly determined that it may enforce or ignore its own rules of procedure, as well as statutes mandating those rules at will. Thus, the important federal question decided by the Kentucky Supreme Court is that the Fourteenth Amendment does not apply to proceedings on review in a state's highest court. This Court has historically declined to review a specific procedure established by a state for compliance with the requirements of due process, except in extreme circumstances. *Lindsey* v. *Dormet*, 405 U.S. 56, 66 (1971). *Minder* v. *Georgia*, 183 U.S. 559, 562 (1901). This is based on the proposition that:

> Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this Court would

> feel justified in saying that there had been a failure of due legal process.

Allen v. *Georgia*, 166 U.S. 138, 140 (1897). This petition, however, presents the question, of whether a failure to follow the procedures established would justify this Court's intervention on a constitutional basis. It is respectfully submitted that if rules can be arbitrarily applied or ignored by a state Court, the very foundation of procedural due process is threatened, as arbitrary process is no process at all.

In the context of administrative proceedings, this application of due process has been alluded to by this Court, *McGautha* v. *California*, 402 U.S. 183, 273 (1971), and recognized by various circuit courts. *See e.g., International House* v. *N.L.R.B*, 676 F.2d 906, 912 2d Cir. (1982); *N.L.R.B.* v. *Welcome-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971). Likewise, the Third Circuit has applied this principle to a District Court proceeding, and in so doing stated:

> Although discussed in an agency context, the concept whereby an agency must abide by its self-imposed rules does not differ in principle from the requirement imposed on a court which enacts its own rules of procedure. . . . By the same token, once a court announces a policy or rule of procedure, until such rule is effectively repealed, the court cannot ignore its own rule or procedure, else litigants who have relied upon it may be led astray.

United States v. *Ferretti*, 635 F.2d 1089 (3d Cir. 1980). Thus, the issue addressed to this Court is whether a person deprived of due process by a state high Court has a forum in which to seek relief.

The scope of review requested is narrow, and no suggestion is made by petitioners that this Court should undertake to monitor the states' high Courts as to correctness or proper application of those courts' rules and procedures. Rather, the Petitioners request that this Court simply establish the bare principle that due process requires a state Court to apply its rules, leaving to the state Court the interpretation and scope of its rules.

Likewise, the action taken by the State Court herein is unambiguous, in that the majority opinion is specific in stating that it expressed no opinion as to the issue of its rules and procedures. The dissenting opinion makes it equally clear that the reason for not considering the rules is that the application of them would have altered the result reached in the case at bar. There is no ambiguity in the language or effect of the rules in question, and accordingly this Court will not find it necessary to interpret state law. Accordingly, if this Court denies the within Petition the state Courts will be granted the luxury of applying their rules when they wish, and allowing them to arbitrarily ignore the same rules at will. Due process requires a contrary result.

CONCLUSION

For the reasons set forth hereinabove it is respectfully submitted that the Petition should be granted.

Ronald L. Green
BOEHL STOPHER GRAVES & DEINDOERFER
444 West Second Street
Lexington, Kentucky 40508
Counsel of Record

AND

Robert H. Measle
FOWLER MEASLE & BELL
4-A Citizens Bank Square
Lexington, Kentucky 40507
Counsel for Petitioners

APPENDIX

APPENDIX A

RENDERED: November 21, 1985
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

84-SC-844-DG
85-SC-63-TRG

WILLIAM B. TABLER, ARCHITECT
and DOVER ELEVATOR COMPANY — MOVANTS

ON REVIEW FROM COURT OF APPEALS

V. — #83-CA-2160-MR
(Fayette Circuit Court #81-CI-1066)

MARY L. WALLACE, ADMINISTRATRIX
OF THE ESTATE OF WILLIAM WALLACE,
and MARY L. WALLACE,
INDIVIDUALLY — RESPONDENTS

AND

GENERAL ELECTRIC COMPANY,
ARKWRIGHT-BOSTON MANUFACTURERS,
MUTUAL INSURANCE COMPANY, and
INDUSTRIAL RISK INSURERS — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT

V. — HON. BENJAMIN F. SHOBE, JUDGE
NO. 79-CI-01275

NUCOR CORPORATION,
HARMAN & CONWAY, INC.,
JACOB A. HARMAN, POLK
CONWAY, and GARST-RECEVEUR
CONSTRUCTION COMPANY, INC. — APPELLEES

OPINION OF THE COURT BY JUSTICE LEIBSON

AFFIRMING IN PART/REVERSING IN PART

In these two consolidated cases[1] we again take up the issue of the constitutionality of KRS 413.135, the "no action" statute which provides those persons engaged in the "design, planning, supervision, inspection or construction of any improvement to real property" with immunity from suit for damages or injury caused by any deficiency after the expiration of five years following the substantial completion of such improvement.

In the first case, *Tabler* v. *Wallace*, a maintenance man sustained fatal injury while servicing an elevator in the Harley Hotel in Lexington, Kentucky. He was crushed between the top of the elevator and the roof of the elevator shaft. The Estate's complaint charges that the overall design of the elevator and shaft was negligent and unreasonably dangerous because the clearance between the two was deficient and inadequate in terms of industry codes and safety standards. The Estate sued Dover Elevator Company, whose predecessor sold and installed the elevator and designed the shaft, and Tabler, the architect who approved the design of the shaft in which the elevator was housed.

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[1]These cases involve multiple parties, and their roles are reversed from one case to the other. To simplify we will refer to the cases as *Tabler* v. *Wallace* and *General Electric* v. *Nucor*, and to the parties in their roles as plaintiff and defendants.

In the second case, *General Electric* v. *Nucor*, the loss occurred because of the collapse of the roof of a warehouse of the General Electric Company in Louisville, Kentucky. The collapse occurred because four steel beams, or trusses, intended to support the roof, failed to do so. Nucor had designed the roof and its components, including the trusses, to comply with specifications provided to it. After the design process was completed, Nucor used a standardized computer program to determine which trusses to manufacture. A Nucor employee admitted that he erred in recording a load number specified in the design on the shop list utilized to prepare the trusses. The result was that the trusses were fabricated to only one half the strength required by the design. On July 13, 1977, one of the defective trusses failed, tearing the roof and causing extensive damages. Four weeks later another defective truss collapsed causing further extensive damage to the warehouse and to inventory.

Garst-Receveur Construction Company was the builder employed by General Electric to construct the warehouse. Harmon and Conway, Inc. was the manufacturer's representative for Nucor in the Louisville area. Garst-Receveur entered into a purchase order contract with Harmon and Conway which required Harmon and Company to "furnish all steel joists and joist girders," including the trusses which failed. Harmon and Conway then entered a standard purchase order with Nucor. Garst-Receveur, the builder, and

Harmon and Conway, the supplier, were sued along with Nucor.[2]

The litigation in both *Tabler* v. *Wallace* and *General Electric* v. *Nucor* followed a similar course. In neither did the defendants attempt to plead KRS 413.135, the architects and builders "no action" statute, in response to the original complaint. Initially, in both cases, the defendants assumed that the statute was unconstitutional because our decision in *Saylor* v. *Hall*, Ky., 497 S.W.2d 218 (1973) held that it violated Sections 14, 54 and 241 of the Kentucky Constitution, which restricts legislative power to abolish or limit causes of action predating the Constitution.

In both *Tabler* v. *Wallace* and *General Electric* v. *Nucor*, the defendants were permitted to amend their answers years after the litigation commenced and shortly before trial, at the "eleventh hour," based upon a perceived change in the constitutional status of KRS 413.135 announced in December 1982 in *Carney* v. *Moody*, Ky., 646 S.W.2d 40 (1982). Once the defendants were permitted to amend, in both cases the trial court then granted the defendants summary judgment on grounds that *Carney* v. *Moody* revitalized the "no action statute" because the claims were not filed within five years of completion of construction.

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[2]The warehouse roof collapsed in two stages. General Electric claimed that KRS 413.135 is not applicable to Nucor's alleged fraudulent concealment of the defect after the first partial collapse. Because of the decision of the unconstitutionality of the statute it is unnecessary that we address this further issue.

In *Tabler* v. *Wallace* the Kentucky Court of Appeals reversed the summary judgment on grounds that KRS 413.135 violates the equal protection provisions of both the constitution of Kentucky and the constitution of the United States. Both *Saylor* v. *Hall, supra,* and *Carney* v. *Moody, supra,* considered and analyzed KRS 413.135 "only" under Sections 14, 54 and 241 of the Kentucky Constitution prohibiting the abolition of legal remedies for wrongful death, personal injury, property damages or defamation, but left the question of equal protection an open matter. 497 S.W.2d at 223. The Court of Appeals considered the equal protection and special legislation arguments and concluded that this statute was nothing more than a grant of immunity, arbitrary in nature, with no reasonable basis for a separate classification.

Because of the importance of this constitutional question, we granted discretionary review.[3] The Court of Appeals then asked that we accept transfer of *General Electric* v. *Nucor,* involving the same constitutional question, pending before the Court of Appeals. We granted transfer and consolidated the cases for argument and consideration.

KRS 413.135 derives from legislation commencing in the mid-1960's drafted and promoted by three groups engaged in the construction industry: architects, en-

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[3]The Court of Appeals ruled adversely to defendants' claim that the constitutional issue was not preserved. The constitutional issue was the reason we granted discretionary review. We express no opinion on the preservation issue.

gineers, and builders. These groups were the American Institute of Architects, The National Society of Professional Engineers, and The Associated General Contractors. *See Smith,* "Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers and Builders." 60 Ky L.J. 462 (1971-72). Within a relatively short period of time these groups succeeded in having similar legislation enacted in almost every state. The reaction has been a multitude of cases challenging the constitutionality of this legislation on equal protection grounds In all, we have been cited to cases from thirty-one sister states[4] and several federal jurisdictions, all addressing a constitutional

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[4]*CONSTITUTIONAL: Carter* v. *Hartenstein* 455 S.W.2d 918 (Ark. 1970), *appeal dismissed,* 401 U.S. 901 (1971); *Salinero* v *Pon,* 177 Cal.Rptr. 204 (Cal. 1981); *Cheswold Volunteer Fire Co.* v. *Lambertson Construction Co.,* 462 A.2d 416 (Del.Supr. 1983); *Mullis* v. *Southern Company Services,* 296 S.E.2d 579 (Ga. 1982); *Twin Falls Clinic & Hospital Building Corp.* v *Hamill,* 644 P.2d 341 (Idaho 1982); *Matayka* v. *Melia,* 456 N.E.2d 353 (Ill.App. 1983); *Beecher* v. *White,* 447 N.E.2d 622 (Ind.App. 1983); *Burmaster* v. *Gravity Drainage District No. 2,* 366 So.2d 1381 (La. 1978); *Klein* v. *Catalano,* 437 N.E.2d 514 (Mass. 1982); *O'Brien* v. *Hazelet & Erdal,* 299 N.W.2d 336 (Mich. 1980); *Calder* v *City of Cryst[illegible]* 318 N.W.2d 838 (Minn. 1982); *Anderson* v. *Fred Wagner & Roy Anderson, Jr., Inc.,* 402 So.2d 320 (Miss. 1981); *Reeves.* v. *Ille Electric Co.,* 551 P.2d 647 (Mont. 1976); *Rosenberg* v. *Town of North Bergen,* 293 A.2d 662 (N.J. 1972); *Howell* v. *Burk,* 568 P.2d 214 (N.M. 1977); *Lamb* v. *Wedgewood South Corp* 302 S.E.2d 868 (N.C. 1983); *Hartford Fire Insurance Co.* v. *Lawrence, Dykes. Goddenberger, Bower & Clancy,* ___ F.2d _____, nos. 82-3404; 82-3419 (6th Cir July 31, 1984); *Freezer Storage, Inc.* v. *Armstrong Cork Co.,* 382 A.2d 715 (Pa 1978); *McMacken* v. *South Dakota,* 320 N.W.2d 131 (S.D. 1982); *Harmon* v. *Angus R Jessup Assoc.,* 619 S.W.2d 522 (Tenn. 1981); *Sowders* v. *M.W. Kellogg Co.,* 663 S.W.2d 644 (Tex. App. 1 Dist. 1983); *Good* v. *Christensen,* 527 P.2d 223 (Utah 1974); *Yakima Fruit & Cold Storage Co.* v. *Central Heating & Plumbing Co* 503 P.2d 108 (Wash. 1972).

UNCONSTITUTIONAL: Shibuya v. *Architects Hawaii Ltd.,* 647 P.2d 276 (Hawaii 1982); *Skinner* v. *Anderson,* 231 N.E.2d 588 (Ill. 1967); *Pacific Indemnity Co.* v. *Thompson-Yeager, Inc.,* 260 N.W. 2d 548 (Minn. 1977); *State Farm Fire and Casualty Co.* v. *All Electric, Inc.,* 660 P.2d 995 (Nev. 1983); *Henderson Clay Products, Inc.* v. *Edgar Wood & Assoc.,* 451 A.2d 174 (N.H. 1982); *Loyal Order of Moose, Lodge 1785* v. *Cavaness,* 563 P.2d 143 (Okla 1977); *Broome* v. *Truluck,* 241 S.E.2d 739 (S.C. 1978); *Kallas Millwork Corp* v *Square D Co.,* 225 N.W.2d 454 (Wis. 1975); *Phillips ABC Builders, Inc* 611 P.2d 821 (Wyo. 1980).

challenge on equal protection grounds to this type of statute. If nothing else, the large number of cases illustrates the magnitude of the problem.

Many of these cases from foreign jurisdictions uphold the constitutionality of this legislation against the challenge on equal protection grounds, but turn on the language of the particular state constitution involved. A lesser number of cases, but a growing number, hold to the contrary. In general, the cases holding the statute unconstitutional have followed the reasoning of the first case to do so, *Skinner* v. *Anderson,* 231 N.E.2d 588 (Ill. 1967):

> [T]he statute singles out the architect and the contractor, and grants them immunity. It is not at all inconceivable that the owner or person in control of such an improvement might be held liable for damage or injury that results from a defective condition for which the architect or contractor is in fact [primarily] responsible. . . . the statute takes away [the owner's] action for indemnity against the architect or contractor.
>
> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed the cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnished materials used in

> constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that one event is more likely than the other to occur . . . ." 231 N.E.2d at 591.

Defendants claim that insofar as the challenge to constitutionality under the equal protection clause of the Fourteenth Amendment to the United States Constitution, the United States Supreme Court's denial of certiorari in *Carter* v. *Hartenstein,* 455 S.W.2d 918 (Ark. 1970), appeal dismissed, 401 U.S. 901 (1971), is decisive. However, dismissal for lack of a substantial federal question is a summary disposition and not conclusive precedent, to be accorded "appropriate, but not necessarily conclusive, weight." *Mandel* v. *Bradley*, 432 U.S. 173, 180, 53 L.Ed.2d 199, 97 S.Ct. 2238 (1977).

Before considering the federal constitutional challenge, a threshold question is whether the statute is unconstitutional under a different and narrower provision of the Kentucky constitution. *See Fannin* v. *Williams,* Ky., 655 S.W.2d 480 (1983). We have decided that KRS 413.135 violates Section 59(5) of the Kentucky Constitution, which is more detailed and specific than the equal protection clause of the Federal Constitution. We declare the statute unconstitutional on state grounds, and do not reach the federal question.

The Kentucky Constitution, Section 59, is entitled "Local and special legislation." It provides:

> "The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:
>
> . . . .
>
> Fifth: To regulate the limitation of civil or criminal causes."

When considered against its historical background, it is evident that Section 59 is more than simply another way of restating the generalized language of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Indeed, Sections 1, 2 and 3 of the Kentucky Constitution which provide that the General Assembly is denied arbitrary power and shall treat all persons equally, suffice to embrace the equal protection clause of the Fourteenth Amendment.

But the debates of the Kentucky Constitutional Convention of 1890 and its detailed list particularizing twenty-nine different subjects where the "General Assembly shall not pass local or special acts" provide convincing evidence of the reasons for Section 59, prohibiting local and special legislation. *See* Debates, Constitutional Convention of 1890, 4 Vol.

The history of the times and the nature of the problem becomes clear when one reads the debates. Unbridled legislative power had become the captive of special interest groups. Concern for limiting the powers of the legislature in general, and with cutting off special

and local legislation in particular, was the primary motivating force behind enactment of the new Kentucky Constitution of 1891.

Limitations of time and space prevent restating the proceedings in detail. A few excerpts will suffice:

Delegate Mackoy:

> ". . . now, if there is any one evil more than another which the people of this State have earnestly demanded should be corrected by this Convention, it was that local and special legislation should be rooted up entirely . . . ." Vol. 3, p. 4019.

Delegate Young:

> "no special provisions for anybody, no exemptions, but all to have the same protection and all live under the same law, and no special benefits to anybody . . . ." Vol. 3, p. 3996-97.

Delegate Knox:

> ". . . look at the ponderous volumes of private acts passed our Legislature within the last few years, and enumerate the horde of railroad and other corporations which have been exempted from taxation, and allowed a variety of other special privileges, while battening like vampires upon the substance of the people. . . ." Vol. 1, p. 466.

Delegate Carroll:

> ". . . except for the vicious legislation and the local and special laws of all kinds and character passed by the Legislatures that have met in Kentucky for the last twenty years, that no proposition to call a Constitutional Convention could ever have received a majority of the votes of the people of Kentucky." Vol. 1, p. 1482.

City of Louisville v. *Kuntz,* 104 Ky. 584, 47 S.W. 592 (1898) followed with the new constitution fresh in mind. Our Court struck down as special legislation an act of the General Assembly providing a shorter statute of limitations for cities than existed for other claims for personal injury or property damage. The Court stated:

> "Section 59 of the Constitution expressly prohibits the legislature from passing a local or special act relating to limitation, and this case clearly illustrates the wisdom of the provision."

Attempted justification for a special protected classification for cities in 1898 would be more easily understood than the attempt to justify a special classification for architects, engineers and builders in 1965. Nevertheless, such special classification could not withstand constitutional challenge.

Other cases invalidating special statutes of limitations under Section 59(5) of the Kentucky Constitution

include *Commonwealth* v. *McCoun*, Ky., 313 S.W.2d 585 (1958); *City of Louisville* v. *Louisville Taxicab & Transfer Co.*, Ky., 238 S.W.2d 121 (1951); and *Gorley* v. *City of Louisville*, Ky., 47 S.W. 263 (1898).

In *City of Louisville* v. *Klusmeyer*, Ky., 324 S.W.2d 831 (1959), our Court struck down a statute seeking to protect city government by imposing primary liability upon the abutting property owner for injuries caused by defects in the sidewalk in cities of the first-class. Although our Constitution permits special legislation made local to a particular class of city where it pertains to organization and government, it prohibits other legislation made applicable to a single class "not based upon a natural, real or substantial distinction inhering in the subject matter." 324 S.W.2d at 834.

In contrast to the extensive history of our present constitution, the absence of any legislative history for KRS 413.135 is equally revealing. We know who initiated and lobbied for the legislation, but we know of no committee meetings or legislative debate discussing its purpose. The only legislative "history," as such, for KRS 413.135, is that contained in the title to the act:

> "An Act relating to the Statutes of Limitations governing the bringing of certain types of actions for wrongful death, personal injuries or damage to real or personal property, and creating a new section of Kentucky Revised Statutes, Chapter 413." Ky.Acts Ch. 246 (1966).

This title serves more to conceal than to reveal the nature of the act. It is an act which denies the right to sue for any cause (not just "wrongful death, personal injuries or damage to . . . property") five years following the substantial completion of construction. It does not function as a statute of limitations, but only to cut off claims which have not accrued within that period. It specifically provides that it does not supplant or extend existing limitations of actions pertaining to the same subject matter, such as one year after the cause of action accrues for personal injury or wrongful death (KRS 413.140) and five years after the cause of action accrues for property damage (KRS 413.120). Instead, KRS 413.135 functions as a one-way ticket to "Topsy-Turvy Land," a place described by Judge Jerome Frank in *Dincher* v. *Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952), where you "die before you are conceived, or be divorced before every you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad."

The argument is that the act is called a "statute of limitations" but its purpose is not to limit the time in which to bring causes of action which have accrued but to extinguish causes of action which have not yet accrued, and that, whereas the title to the act is generalized, the contents of the act refer to a narrowly defined and exclusively protected class. The Alabama Supreme Court has invalidated a similar architects and builders immunity statute under that state's counterpart to Section 51 of the Kentucky Constitution. We

need not decide the constitutional challenge presented by Section 51, since we have decided this case under Section 59(5). However, the arguably deceptive nature of the title of this act re-enforces the perception that it was enacted in response to a lobbying effort rather than because of reasonable, natural and justifiable distinctions between the protected group and others.

The fundamental question is whether the General Assembly had a reasonable basis for this legislation sufficient to justify creating a separate classification for certain persons engaged in the construction of improvements to real property, granting these persons a special immunity. cf. *Miles* v *Shauntee,* Ky., 664 S.W.2d 512 (1984); *Board of Education of Jefferson County* v. *Board of Education of Louisville,* Ky., 472 S.W.2d 496 (1971). The South Carolina court stated in *Broome* v. *Truluck,* 241 S.E.2d 739 (S.C. 1978):

> "While it is broadly stated that a vital distinction exists between architects, engineers and contractors on the one hand and owners and manufacturers on the other, such vital distinction is no where pointed out such as to justify granting immunity to one group and not to the other." *Id* at 740.

A number of different reasons have been suggested by the defendants and those filing amicus curiae briefs on their behalf for creating a separate classification for these groups. But these are offered only as possible reasons that could have existed, not as reasons that did in fact exist. The justifications offered are largely

self-contradictory. For instance, one brief argues that the justification for the statute is to prevent the protected class from being inundated by law suits; another that ninety percent or more the cases of this type involved damages or injuries occurring within five years of construction and the statute addresses very few stale claims that present a disproportionate and excessive burden on the building industry.

One brief argues that it is reasonable to protect architects and builders and not product manufacturers and suppliers because product manufacturers and suppliers can utilize factory control and pretesting procedures and thus control their negligence in a way not available to architects and builders; another that the public does not need the same protection from architects and builders that it needs from product manufacturers and suppliers, because architects and builders have inspectors constantly looking over their shoulders and because no building can be occupied until after it has been thoroughly inspected.

The same evidentiary difficulties that confront builders and architects confront every litigant involved in an injury arising from the construction of an improvement to real property. As stated in *Overland Construction Co.* v. *Sirmons,* 369 So.2d 572 (Fla. 1979):

> "Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence . . . .The impact of these problems, however,

> is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintifs, who must generally carry the initial burden of establishing that the defendant was negligent." *Id.* at 574.

One defendant conceded that the justifications offered were self-contradictory, but argued that their contradictory nature was immaterial so long as one or the other of the reasons is not irrational. The creative abilities of lawyers suggesting possible reasons after the fact does not suffice to provide the kind of justification that is required for special legislation to be valid under Section 59 of the Kentucky Constitution.

Defense counsels' arguments throughout have been to the effect that any reason however imaginative that *could* have existed requires us to uphold otherwise discriminatory legislation. On the contrary, there must be a substantial and justifiable reason apparent from legislative history, from the statute's title, preamble or subject matter, or from some other authoritative source.

One of the principal arguments offered in support of special protection for architects and builders as contrasted with product manufacturers and suppliers is the supposed distinction between providing goods and services. To explore this argument requires some brief historical reflection.

There has never been any distinction under a negligence theory of liability between the treatment of

goods and services. Following a landmark English case decided in 1842, *Winterbottom* v. *Wright*, 10 M. & W. 109, 152 Eng.Rep. 402 (1842), which *in fact* "held only that the obligation of a contract could give no right of action to one who was not a contracting party (Prosser, *Law of Torts*, 4th Ed. 1971)," American courts erroneously applied to tort cases the contract doctrine of privity. They held that there must be a contractual relationship between the parties as a prerequisite to tort liability. This error was exposed and corrected for negligence cases by Justice Benjamin Cordozo in the landmark case of *MacPherson* v. *Buick Motor Co.*, 111 N.E.2d 1050 (N.Y. 1916). Following the demise of the erroneous defense of privity in negligence cases, there was a growing number of suits against architects and builders based on defects in construction. *See* Smith, *Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers, and Builders, supra*. It was this growing number of suits, not any distinction in negligence law between goods and services, that caused certain professional groups to lobby for special legislation. For similar reasons the railroads and others had sought and obtained special privileges from the General Assembly during the 1880's and thus precipitated a constitutional convention.

Nothing in this set of circumstances provided a constitutionally acceptable reason to discriminate between goods and services. In *In Re Beverly Hills Fire Litigation*, Ky., 672 S.W.2d 922 (1984), we pointed out

that this statute excluded materialmen for no well considered "reason," but because they were not "among the pressure groups initiating the legislation." 672 S.W.2d at 925. Landowners are similarly excluded from this protection. Thus, whatever the statutory objective, it was achieved by this statute in a discriminatory fashion. The express purpose of Section 59(5) of the Constitution is to prevent those who have sufficient political power or who can afford a persuasive lobbyist from achieving immunity from accountability to the law that governs others. *See Phillips* v. *ABC Builders*, 611 P.2d 821 (Wyo. 1980), invalidating an architects and builders immunity statute under a constitutional provision substantially identical to our Kentucky Constitution Section 59(5).

In the last twenty years an *additional* theory of liability labeled "strict liability in tort" has developed against products manufacturers and suppliers who fall within the class described in Section 402A of the *Restatement (Second) Torts*. But there has never been any distinction under a negligence theory between the treatment of goods and services.

Tort Law in America, An Intellectual History, by Prof. G. Edward White of the University of Virginia Law School, traces the growth and development of tort law from the common law writ system to the negligence theory during the last half of the last century and the early part of this one. The treatment of the concept of

negligence as expressing a universal duty is a hundred years old.

> "The growth of negligence from the omission of a preexisting, specific duty owed to a limited class of persons to the violation of a generalized standard of care owed to all ensured the emergence of Torts as an independent branch of law." G.E. White, *Tort Law in America, An Intellectual History,* 18 (1980).

The concept of negligence preexisted the Kentucky Constitution. The question debated in *Saylor* v. *Hall, supra,* and *Carney* v. *Moody, supra,* was whether the privity requirement was part of the negligence concept in the period before the 1891 Constitution. A 1905 case, *Simons* v. *Gregory,* 120 Ky. 116, 85 S.W. 751 (1905), is cited for the proposition that it was. However, this reads more into *Simons* v. *Gregory* than the language of the opinion provides. *Carney* v. *Moody* reached an opposite result from *Saylor* v. *Hall* while conceding there was no "factual distinction" and without overruling it.

We need not write Chapter Three to *Saylor* v. *Hall* and *Carney* v. *Moody.* The inquiry has shifted from whether the statute is arbitrary and discriminatory, to constitutional issues not discussed in those opinions, equal protection and special legislation. With this the issue, constitutionality does not turn on deciphering the status of the cause of action "prior to the adoption of the Constitution (*Carney* v. *Moody, supra,* 646

S.W.2d at 41)," but on whether the General Assembly had a rational justification for creating a special class and conferring special privileges and immunity on that class at the time the statute in question was enacted. No substantial reason has been presented to us.

The only apparent basis for the present legislation is that a special class, builders, architects and engineers involved in construction, faced with a growing exposure to litigation, lobbied for a statute limiting their liability. There is no social or economic basis presented to justify a special class, only their own self-interest. Other groups similarly situated do not share in their legislative windfall. Their subjective reasons will not withstand public policy analysis.

The general public is exposed to injury, death and property damage from the collapse of a building. As in the recent catastrophe involving the collapse of the overhead walkway in the Hyatt Regency Hotel in Kansas City, many people from all walks of life may be injured in one catastrophe caused by faulty construction. The protection of the general public is sacrificed to the interest of a special group. This is the essence of the constitutional evil addressed by Section 59, the prohibition against local and special legislation.

Where to draw the line as to what constitutes a "reasonable basis" for otherwise discriminatory legislation is a difficult matter. We do not do so here beyond stating that imaginative reasons that *could* exist,

without anything of a positive nature to suggest that they *did* exist, do not suffice.

In Re Beverly Hills Fire Litigation, supra, held that KRS 413.135 had no application to the manufacturers of aluminum wire used in the electrical circuits in the Beverly Hills Supper Club. We concluded that the statute was not intended to cover products manufacturers, suppliers and materialmen, based on the express language of the statute, the history of its development, and the constitutionally impermissible arbitrariness of attempting a distinction between products utilized as component parts in a building and the same other products not so utilized. One of the principal arguments between the parties in the present case is whether or not certain of the defendants should be classified as products manufacturers and suppliers, not including within the terms of KRS 413.135. Both sides rely on the *Beverly Hills Fire Litigation* case in support of their arguments.

In *Tabler* v. *Wallace,* one of the principal defendants is Dover Elevator Co. which, through its predecessor, manufactured and supplied the elevator and also assisted in the design and construction of the portion of the building which housed it. If there is liability it is based upon a combination of the elevator which is a product, and the shaft which is not, and Dover Elevator Co. had a hand in both items.

In *General Electric Co.* v. *Nucor*, General Electric makes a plausible argument that the gravamen of the action is not the design or construction of the roof, or even the trusses, but an admitted error in what is a standardized process for manufacturing girders which are essentially uniform in nature. So viewed, Nucor is a products manufacturer and Harman & Conway, Inc. is a products supplier.

We need not attempt to unravel the dilemma which occurs in both of these cases in attempting a rational distinction between the role of products manufacturers or suppliers on the one hand, and design and construction on the other. It suffices that the argument highlights the arbitrariness of providing an immunity to those engaged in design and construction of a real estate improvement which does not extend to others similarly situated. It was this type of arbitrariness that Kentucky Constitution Section 59 in general, and Subsection 5 in particular, was designed to prevent.

The continuing viability of Section 59 of the Kentucky Constitution has been recently expounded in *Miles* v. *Shauntee, supra,* and in *Board of Education of Jefferson County* v. *Board of Education of Louisville, supra. Commonwealth* v. *O'Harrah,* 262 S.W.2d 385, 389 (1953) states our duty to support both the "letter and spirit" of the Constitution. We "may not countenance an evasion or even an unintentional avoidance of our fundamental law." *Id.* KRS 413.135

is in fundamental conflict with Kentucky Constitution Section 59(5) and its historical development.

The decision of the Court of Appeals in *Tabler* v. *Wallace* is affirmed. The decision of the trial court in *General Electric* v. *Nucor* is reversed. Both cases are remanded to the trial courts for further proceedings consistent with this opinion.

Stephens, C.J., Aker, Gant, and Leibson, JJ., concur in both cases. Vance, J., concurs in *General Electric* v. *Nucor,* but dissents in *Tabler* v. *Wallace.* Stephenson, J., dissents in both cases by separate dissenting opinion. Wintersheimer, J., dissents in both cases.

ATTORNEYS FOR MOVANT, TABLER:

W. T. Adkins
Ronald L. Green
444 W. Second Street
Lexington, KY 40508

ATTORNEYS FOR MOVANT, DOVER ELEV.:

Robert H. Measle
Suite 4-A
Citizens Bank Square
Lexington, KY 40507

ATTORNEY FOR RESPONDENTS,
MARY L. WALLACE, ET AL.:

Peter Perlman
388 S. Broadway
Lexington, KY 40508

ATTORNEY FOR AMICUS CURIAE,
PRC Engineering, Inc.:

Laurence J. Zielke
A. Neal Herrington
Frank G. Simpson III
1705 Meidinger Tower
Louisville, KY 40202

ATTORNEY FOR AMICUS CURIAE,
KY. HOME BUILDERS ASSN.:

W. Terry McBrayer
Jo Ann Alexander
400 American Bank Bldg.
Short & Upper Streets
Lexington, KY 40507

ATTORNEYS FOR APPELLANTS,
GENERAL ELECTRIC, ET AL.:

Sheryl G. Snyder
Francis J. Mellen, Jr.
Virginia H. Snell
Citizens Plaza
Louisville, KY 40202

ATTORNEYS FOR APPELLEES,
NUCOR CORP.:

Winfrey P. Blackburn, Jr.
W. Kennedy Simpson
600 W. Main Street
Louisville, KY 40202

William A. Miller, Sr.
725 Marion E. Taylor Bldg.
Louisville, KY 40202

ATTORNEYS FOR APPELLEES,
HARMAN & COMPANY, JACOB HARMAN,
AND POLK COMPANY:

Ronald V. Simpson
2800 First National Tower
Louisville, KY 40202

ATTORNEYS FOR APPELLEE,
GARST-RECEVEUR:

Victor W. Ewen
Campbell Ewen
650 Starks Bldg.
Louisville, KY 40202

RENDERED November 21, 1985
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
84-SC-844-DG
85-SC-63-TRG

WILLIAM B. TABLER, ARCHITECT
and DOVER ELEVATOR COMPANY MOVANTS

ON REVIEW FROM COURT OF APPEALS
V. #83-CA-2160-MR
(Fayette Circuit Court #81-CI-1066)

MARY L. WALLACE, ADMINISTRATRIX
OF THE ESTATE OF WILLIAM WALLACE,
and MARY L. WALLACE,
INDIVIDUALLY RESPONDENTS

AND

GENERAL ELECTRIC COMPANY,
ARKWRIGHT-BOSTON MANUFACTURERS,
MUTUAL INSURANCE COMPANY, AND
INDUSTRIAL RISK INSURERS APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. BENJAMIN F. SHOBE, JUDGE
NO. 79-CI-01275

NUCOR CORPORATION,
HARMAN & CONWAY, INC.,
JACOB A. HARMAN, POLK &
CONWAY, AND GARST-RECEVEUR
CONSTRUCTION COMPANY. INC APPELLEES

DISSENTING OPINION BY JUSTICE STEPHENSON

From a reading of the majority opinion, as it applies to *Tabler* v. *Wallace,* I conclude that this is an opinion of great significance to bench and bar. The significance that I attach to the opinion is not in what it says, but in what it does not say.

The issue upon which this case was decided by the Court of Appeals and this court was not presented to the trial court; thus, it was not preserved for appellate review. In reversing the trial court, the Court of Appeals carefully avoided saying that the trial court was in error. Instead, in an obscure footnote, the Court of Appeals refers to arguments about non-preservation, etc., and concludes the arguments are not persuasive. This elevates judicial obfuscation to new heights. The record is clear that the issue was not presented to the trial court. Wallace does not argue otherwise. Apparently, considering that an obscure footnote is a proper judicial burial place for a well established rule of law, the majority opinion, by footnote, observes that the Court of Appeals ruled adversely to the claim that the constitutional issue was not preserved; then; like Pontius Pilate, the majority washes its hands of the issue by saying we express no opinion on the preservation.

I daresay the reader of the majority opinion would discern through the judicial fog that there was some issue about preservation in the Court of Appeals, and it was not worthy of further comment.

Towards the end of the majority opinion, it is stated: "We may not countenance an evasion or even an unintentional avoidance of our fundamental law." This is a lofty sentiment about the constitution and should apply equally to a rule of law of preservation of issues for appellate review.

This noble sentiment will be small comfort to those members of the bar who have lost in this court and the Court of Appeals for the reason that an issue was not preserved.

The language "not preserved for appellate review" is to be found in a multitude of opinions but, apparently now and in the future, we will be treated to a selective system of application of the rule. When it feels good, the rule can be ignored in an obscure footnote.

In this court, the lawyer for Wallace makes the strange argument that somehow this issue could not be presented to the trial court until after judgment (the issue was not presented after judgment either). In *General Electric* v. *Nucor,* the issue was presented to the trial court, thus preserving it.

Manifest injustice is also argued, but not why we should invoke this principle. Presumably, Wallace will feel distressed, but this is not enough. Wallace's lawyer should have raised the issue if he wanted us to consider it.

In matters of this importance, the reasons for not following the rule on preservation should spelled out so that the bar will have some indication of the circumstances in which this rule will be applied in the future. The trial court had no opportunity to rule on the issue. The judgment of the trial court should be affirmed and the Court of Appeals reversed.

Accordingly, I dissent from the holding in *Tabler* v. *Wallace*.

Vance and Wintersheimer, JJ., join in this dissent.

I also dissent from the holding in *General Electric* v. *Nucor* for the reason that I do not believe KRS 413.135 violates Section 59 of the Kentucky Constitution.

Wintersheimer, J., joins in this dissent.

APPENDIX B

FILED
DEC 11 1985

JOHN C. SCOTT
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 84-SC-844-D

WILLIAM B. TABLER, ARCHITECT
and DOVER ELEVATOR
COMPANY — PETITIONERS

VS: **JOINT PETITION FOR REHEARING**

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE,
Individually — RESPONDENTS

REVIEW OF APPEAL 83-CA-2160-MR FROM
FAYETTE CIRCUIT COURT

JOINT PETITION FOR REHEARING

W. T. ADKINS
RONALD L. GREEN
BOEHL STOPHER GRAVES & DEINDOERFER
444 West Second Street
Lexington, KY 40508
Telephone (606) 252-6721
Attorneys for Petitioner, William B. Tabler

ROBERT H. MEASLE
FOWLER, MEASLE & BELL
Fourth Floor
Citizens Bank Square
Lexington, KY 40507-1680
Telephone: (606) 252-6731
Attorneys for Petitioner, Dover Elevator Company

This is to certify that pursuant to CR 76.12(5), copies of the within Petition for Rehearing have been served upon Hon. Peter Perlman, 388 S. Broadway, Lexington, KY 40508, Hon. John P. Hays, Chief Judge, Hon. Boyce G. Clayton, Judge, Hon. Harris S. Howard, Judge, Kentucky Court of Appeals, 403 Wapping Street, Frankfort, KY 40601 and Hon. James E. Keller, Judge, Fayette County Courthouse, Lexington, KY 40507; this the 10th day of December, 1985.

/s/ W. T. Adkins
ATTORNEYS FOR PETITIONERS, WILLIAM B. TABLER and DOVER ELEVATOR COMPANY

STATEMENT OF POINTS & AUTHORITIES

I. THE CONSTITUTIONAL ATTACK UPON KRS 413.135 WAS NOT RAISED IN THE TRIAL COURT AND, CONSEQUENTLY, IT HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW 3

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Ky., 556 S.W.2d 146 (1977) 4
Howard v. *Hamilton,*
Ky. App., 612 S.W.2d 345 (1981) 4
Pittsburgh & Midway Coal Mining Co. v. *Rushing,*
Ky. App., 456 S.W.2d 816, 818 (1969) 4, 5
Taxpayers' Action Group of Madison County
v. *Madison County Board of Elections,*
Ky. App., 652 S.W.2d 666 (1983) 5
Lawrence v. *Risen,*
Ky. App., 598 S.W.2d 464 (1980) 5, 6

II. THE SUBSEQUENT NOTIFICATION OF THE ATTORNEY GENERAL AFTER THE JUDGMENT WAS RENDERED BY THE TRIAL COURT DOES NOT SATISFY THE REQUIREMENTS OF KRS 418.075 AND CIVIL RULE 24.03 AS PREREQUISITES FOR ATTACKING THE CONSTITUTIONALITY OF A STATUTE 6

KRS 413.135 ..... 6, 7, 8, 9
KRS 418.075 ..... 6, 7
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Ky., 469 S.W.2d 548 (1971) 8
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Ky. App., 555 S.W.2d 589 (1977) 8
McNeal v. *Armour and Co.*,
Ky. App., 660 S.W.2d 953 (1983) 8
Fields v. *Evans*,
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III. CONCLUSION 9

PURPOSE OF THE BRIEF

The Supreme Court of Kentucky, by its opinion, rendered on November 21, 1985, affirmed the judgment of the Court of Appeals holding that KRS 413.135 was unconstitutional. The Court of Appeals held that the trial court should not have rendered summary judgment in favor of the Appellees, William B. Tabler and Dover Elevator Company, because the statute upon which they relied on as a complete defense was unconstitutional. On the Appellees Motion for Discretionary Review, the Supreme Court of Kentucky considered the case of *Tabler* v. *Wallace* and the companion case, *General Electric* v. *Nucor*, a similar case from Jefferson Circuit Court. In *General Electric* v. *Nucor*, the issue attacking the constitutionality of KRS 413.135 was properly preserved. In *Tabler* v. *Wallace*, it was not so preserved.

The Petitioners, William B. Tabler and Dover Elevator Company, submit that the Court of Appeals overlooked certain material facts in the Record and evidently misconceived certain issues properly presented on the appeal from the Circuit Court. These Petitioners submit that the failure of Respondents' counsel, in the *Tabler* v. *Wallace* case, to raise the constitutional attack of the statute and to serve notice of such an attach upon the Attorney General did not properly preserve that issue for appellate review.

At issue in this Petition is whether the failure of this Court to follow its own rules and the statutes of

the General Assembly, violates the concept of due process as embodied in the Federal and State Constitutions. It is significant in this regard that this Court did not construe those rules and statutes in such a way as to be inapplicable, but rather simply disregarded the same even though the Petitioners relied upon the same as a defense. There can be no question that this Court would reverse the decision of any other tribunal who reached the decision in violation of its own rules and procedures. Thus, the purpose of this Petition is to provide this Court with the opportunity to reach the constitutional issues where appropriate and to reverse the Court of Appeals' opinion insofar as this case is concerned.

The majority opinion sidesteps this problem with footnote 3, which states that review was not granted as to the preservation issue, although the order granting review takes the entire case. Further, at least three Justices felt that the issue was before the Court, and when counsel argued the point no member of the Court suggested that the procedural defenses were not at issue herein.

QUESTIONS TO WHICH BRIEF IS ADDRESSED

1. Whether the failure of the Respondent, Mary L. Wallace, to raise a constitutional attack on KRS 413.135 at the Circuit Court level, denies her further appellate review of the issue?

2. Whether the Respondent, Mary L. Wallace, by failing to timely notify the Attorney General of her intention to attack the constitutionality of KRS 413.135, has forfeited her right to raise the issue with the Court of Appeals?

The Petitioners, William B. Tabler and Dover Elevator Company, respectfully submit that the answer to both of these questions is in the affirmative.

ARGUMENT

I. THE CONSTITUTIONAL ATTACK UPON KRS 413.135 WAS NOT RAISED IN THE TRIAL COURT AND, CONSEQUENTLY, IT HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

The Fayette Circuit Court held that the Petitioners were entitled to summary judgment because *Carney, et al* v. *Moody, et al*, Ky., 646 S.W.2d 40 (1983), should be applied retroactively in the case at bar. In her Reply Memorandum in support of her Motion for Summary Judgment, the Respondent Mary L. Wallace, argued that the statute of limitations and the *Carney* case were not applicable to the case at bar. In fact, the issue of the statute's constitutionality was not raised by the Respondent until she was preparing her appeal to the Court of Appeals, after the Circuit Court entered its Summary Judgment dismissing these Petitioners from that action. It was at that time, the Respondent, Mary L. Wallace, served notice upon

the Attorney General that she desired to attack the constitutionality of KRS 413.135.

On the appeal, the Court of Appeals completely disregarded Petitioners' arguments regarding preservation of error as presented to the Court. By a mere footnote, the Court of Appeals dispensed with the Respondent's obvious failure to comply with the well established cases of Kentucky law regarding appellate procedure.

It is well recognized by the decisional law of Kentucky that, as a general proposition, issues which have not been presented to the trial court cannot be raised for the first time on appeal. *Akers* vs. *Floyd County Fiscal Court*, Ky., 556 S.W.2d 146 (1977); *Howard* vs. *Hamilton*, Ky. App., 612 S.W.2d 345 (1981). As stated in *Pittsburgh & Midway Coal Mining Co.* vs. *Rushing*, Ky. App., 456 S.W.2d 816, 818 (1969):

> The rule is firmly established that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert manifest injustice that this court will entertain an argument not first presented to the trial court.

The Respondent creatively argues that the equal protection issue "became ripe for decision only upon entry of summary judgment, when the discriminatory classifications of the statute became real and ap-

parent." (R.B. 6)[1] Furthermore, Respondent also argues that manifest injustice will result if the Court does not address the constitutional argument. *Id.*

The importance is not in what the Court of Appeals or the Respondent said, but in what they did not say. Neither the Court of Appeals nor the Respondent has ever stated that there is any evidence in the record which indicates that the constitutional attack of KRS 413.135 was properly preserved for appellate review. Failure of a party to raise the issue of the constitutionality of a statute at the trial court level requires the denial of appellate review on the issue. *Taxpayers' Action Group of Madison County* vs. *Madison County Board of Elections,* Ky. App., 652 S.W.2d 666 (1983). Relying upon *Pittsburgh & Midway Coal Mining Co.* vs. *Rushing,* the Kentucky Court of Appeals held that the party's failure to raise a constitutional claim at the trial court level barred them from asserting a due process claim on appeal.

> It is firmly estalished appellate principle that a trial court must first be given the opportunity to rule on a question for which review is sought.

Id. at 668. The Court of Appeals has long recognized that a party cannot raise new issues after the entry of summary judgment against it. *Lawrence* vs. *Risen,* Ky. App., 598 S.W. 2d 474 (1980). In

[1]R.B. is used to identify the brief of the Respondent, Mary L. Wallace, filed with the Supreme Court.

Lawrence, the appellant contended that certain no-fault provisions were not applicable to him, or in the alternative, that such provisions were unconstitutional. The *Lawrence* court recognized that:

> The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this court. *Id.* at 476.

It should be recognized that *Tabler* vs. *Wallace*, the subject of this Petition for Rehearing and the case consolidated with *General Electric* vs. *Nucor* by the Supreme Court on its own motion without the opportunity of these Petitioners to respond has significant differences in the facts as they appear of record. In *General Electric* vs. *Nucor*, the constitutionality of KRS 413.135 was properly preserved for appellate review. In *Tabler* vs. *Wallace*, the issue of the constitutionality of KRS 413.135 was not properly preserved for review by the Court of Appeals and, logically, not available for discretionary review by the Supreme Court of Kentucky.

II. THE SUBSEQUENT NOTIFICATION OF THE ATTORNEY GENERAL AFTER THE JUDGMENT WAS RENDERED BY THE TRIAL COURT DOES NOT SATISFY THE REQUIREMENTS OF KRS 418.075 AND CIVIL RULE 24.03 AS PREREQUISITES FOR ATTACKING THE CONSTITUTIONALITY OF A STATUTE

The Fayette Circuit Court rendered Summary Judgment in favor of the Petitioners on or about June 22, 1983. A review of the record indicates that the Attorney General was not notified of this action until after the Summary Judgment was granted to these Petitioners by the Circuit Court. Then the Respondent served a Notice of Appeal and her Brief to the Court of Appeals upon the Attorney General, on or about July 15, 1983. In her brief, the Respondent admits that she did not receive notice of the Attorney General's intention not to intervene until October 25, 1983, nearly four months after judgment was entered against her (R. B. 6).

Therefore, the Respondent has failed to give timely notice of her intention to attack the constitutionality of KRS 413.135. The relevant portion of KRS 418.075 provides:

> In any proceedings which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

A review of the record clearly indicates that the Respondent has failed to satisfy the requirements of this statute.

Rule 24.03 of the Civil Rules of Procedure also requires notice to the Attorney General. The relevant portion of that Rule provides:

> When the constitutionality of an act of the General Assembly affecting the public interest is drawn in question in any action to which the State or an officer, agency, or employee thereof is not a party, the movant shall serve notice of the motion upon the Attorney-General.

The Respondent argues that the Petitioners' arguments on this point are without merit and should be considered as moot. (R. B. 6). However, to properly attack the constitutionality of a statute, the Attorney General must be served with a copy of the petition and given an opportunity to enter the litigation. *Dewey* v. *Allinder,* Ky., 469 S.W.2d 548 (1971). A failure to notify the Attorney General of a claim attacking a statute's unconstitutionality before a judgment is rendered procedurally bars the Court of Appeals from considering the issue. *Blake* v. *Woodford Bank & Trust Co.,* Ky. App., 555 S.W.2d 589 (1977). *See also McNeal* v. *Armour and Co.,* Ky. App., 660 S.W.2d 953 (1983): *Fields* v. *Evans,* Ky. App., 675 S.W.2d 3 (1984) (Discretionary Review Denied).

Relying on *Blake* v. *Woodford Bank & Trust Co.,* the Court of Appeals in *Carr* v. *Cincinnati Bell, Inc.,* Ky. App., 651 S.W.2d 126 (1983), held that certain prerequisites must be met before the issue of a

statute's constitutionality can be appealed. The Court stated that the "contention is not open to review as it was not raised in the lower Court nor was there compliance with CR 24.03 requiring notification of the Attorney General." *Id.* at 127.

The significance of the Respondent's failure to timely notify the Attorney General's office is twofold. First, the failure to comply with the statute and rules of civil procedure has been held to be sufficient to deny appellate review on constitutional issues. More importantly, the failure to timely notify the Attorney General evidences that the Respondent did not desire to contest the constitutionality of the statute prior to the entry of summary judgment against her. This second point is supportive of the Petitioners' position that the issue of the constitutionality of 413.135 was not properly preserved at the trial court level for appellate review.

III. CONCLUSION

While there are ample decisions supportive of Petitioners' position rendered by the Court of Appeals and the Supreme Court on this issue, the question of whether *this* Respondent has properly preserved the constitutional attack on KRS 413.135 has not been addressed by the Court of Appeals or the Supreme Court in this litigation. This threshold question of the preservation of issues for appeal must be considered before the Respondents are entitled to appellate

review on the constitutionality of KRS 413.135. In his dissent from the opinion of the Court of Appeals, Judge Howard correctly stated:

> This issue was never raised before the trial court, and under well-considered and longstanding precedence, it cannot be considered for the first time on appeal. *Pittsburgh & Midway Coal Mining Co.* v. *Rushing*, Ky., 456 S.W.2d 816 (1969); *Akers* v. *Floyd County Fiscal Court*, Ky., 556 S.W.2d 146 (1977). Therefore, I would affirm the judgment of the trial court. (Howard's dissent, *Wallace* v. *Tabler*, Ct. App. Opinion, p. 11.)

It is apparent upon the face of the majority opinion written by Justice Leibson that the Supreme Court likewise sidestepped this issue when it considered *Tabler* v. *Wallace*, as evidenced by the discussion appearing in footnote 3 on page 5 thereof, which states:

> The Court of Appeals ruled adversely to defendant's claim that the constitutional issue was not preserved. The constitutional issue was the reason we granted discretionary review. We express no opinion on the preservation issue.

This, in effect, leaves these Petitioners in a no-win situation. An obvious error, prejudicial to the substantive rights of these Petitioners, has been committed. However, the Supreme Court's refusal to address this error on review, leaves these Petitioners without a legal remedy, and without due process.

The majority opinion of this Court insofar as it relates to *Tabler* v. *Wallace* constitutes a complete abolishment of the long-standing principle of *stare decisis*. There can be no other conclusion. This Court must consider the impact of this decision upon the question of preservation of issues for appellate review, as well as its impact on other cases pending in the Court of Appeals which present the same problem.

For the foregoing reasons, it is submitted that this Court should reconsider its Opinion and remand this case with directions that a judgment awarded to the Petitioners in Fayette Circuit Court.

Respectfully submitted,

ROBERT H. MEASLE
FOWLER, MEASLE & BELL
Fourth Floor
Citizens Bank Square
Lexington, KY 40507-1680
Attorneys for Petitioner,
Dover Elevator Company

/s/W. T. Adkins
Attorney for Petitioners

W. T. ADKINS
RONALD L. GREENE
BOEHL STOPHER GRAVES &
DEINDOERFER
444 West Second Street
Lexington, KY 40508
ATTORNEYS FOR PETITIONER,
WILLIAM B. TABLER

APPENDIX C

Supreme Court of Kentucky

84-SC844-DG
85-SC-63-TRG

WILLIAM B. TABLER, ARCHITECT
AND DOVER ELEVATOR
COMPANY — MOVANTS

ON REVIEW FROM COURT OF APPEALS
83-CA-2160-MR
(Fayette Circuit Court No. 81-CI-0166)

MARY L. WALLACE, ADMINISTRATRIX
OF THE ESTATE OF WILLIAM WALLACE
AND MARY L. WALLACE,
INDIVIDUALLY — RESPONDENTS

AND

GENERAL ELECTRIC COMPANY
ARKWRIGHT-BOSTON MANUFACTURERS,
MUTUAL INSURANCE COMPANY, AND
INDUSTRIAL RISK INSURERS — APPELLANTS

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BENJAMIN F. SHOBE, JUDGE
No. 79-CI-01275

NUCOR CORPORATION, HARMAN &
CONWAY, NC., JACOB A HARMAN,
POLK CONWAY, AND GARST-RECEVEUR
CONSTRUCTION COMPANY, INC. APPELLEES

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing is denied. The dissenting opinion by Stephenson, J., is modified on its face by deleting Pages 3 and 4 by substituting in lieu thereof new Pages 3, 4, and 5, attached as an appendix to this order.

ENTERED February 27, 1986.

/s/Robert F. Stephens
Chief Justice

about the constitution and should apply equally to a rule of law on preservation of issues for appellate review.

This noble sentiment will be small comfort to those members of the bar who have lost in this court and the Court of Appeals for the reason that an issue was not preserved.

The language "not preserved for appellate review" is to be found in a multitude of opinions but, appearently now and in the future, we will be treated to a selective system of application of the rule. When it feels good, the rule can be ignored in an obscure footnote.

In this court, the lawyer for Wallace makes the strange argument that somehow this issue could not be presented to the trial court until after judgment (the issue was not presented after judgment either). In General Electric v. Nucor, the issue was presented to the trial court, thus preserving it.

Manifest injustice is also argued, but not why we should invoke this principle. Presumably, Wallace will feel distressed, but this is not enough. Wallace's lawyer should have raised the issue if he wanted us to consider it.

Another facet of the nonpreservation issue is the deliberate flaunting of a legislative mandate. Having more than a passing interest in maintaining the validity of legislative enactments, the Legislature enacted KRS 418.075, the relevant portion of which provides:

> . . .In any proceeding which involves the validity of a statute, the attorney general of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the attorney general of

> the state shall also be served with a copy of the petition and be entitled to be heard.

Thus, the Legislature has dictated that the Attorney General shall have a right to be heard *before judgment* when there is an attack upon the constitutionality of a statute. This seems reasonable to me, and this court has consistently required compliance with the statute. *Revis* v. *Daugherty*, 215 Ky. 823, 287 S.W. 28 (1926); *Jefferson Fiscal Court* v. *Trager*, 300 Ky. 606, 189 S.W.2d 955 (1945); and *Dewey* v. *Allinder*, Ky., 469 S.W.2d 548 (1971).

Also, this court decided that the proposition was important enough to be incorporated into our Rules. Thus, CR 24.03 provides in relevant part:

> . . .When the constitutionality of an act of the General Assembly affecting the public interest is drawn in question in any action to which the State or an officer, agency, or employee thereof is not a party, the movant shall serve notice of the motion upon the Attorney-General.

There is no pretense in *Tabler* that there was compliance with either statute or rule. The Attorney General was notified after judgment and after the notice of appeal to the Court of Appeals was filed. Understandably, he declined to intervene. No doubt he made the quaint assumption that the Court of Appeals would follow the statute, the cases based thereon, and our rules. For some strange reason, the Court of Appeals was not persuaded that the matter

was unpreserved. The majority opinion does not even consider this proposition worthy of a footnote. Undoubtedly, this passing over of a failure to follow the statute or the rule in the trial court is due to the fact that there cannot be any reasonable explanation why the proposition can be considered by this court. If the majority believes we should be perfectly flexible and choosey in preservation of arguments, it should so state. The record is there for anyone to see.

In matters of this importance, the reasons for not following the rule on preservation should be spelled out so that the bar will have some indication of the circumstances in which this rule will be applied in the future. The trial court had no opportunity to rule on the issue. The judgment of the trial court should be affirmed and the Court of Appeals reversed.

Accordingly, I dissent from the holding in *Tabler* v. *Wallace*.

Vance and Wintersheimer, JJ., join in this dissent.

I also dissent from the holding in *General Electric* v. *Nucor* for the reason that I do not believe KRS 413.135 violates Section 59 of the Kentucky Constitution.

Architects, builders, etc., comprise a large enough class with particular problems to take it out of the "special legislation" category.

Wintersheimer, J., joins in this dissent.

APPENDIX D

OPINION RENDERED:
TO BE PUBLISHED
September 7, 1984; 10:00 a.m.

Commonwealth of Kentucky

Court of Appeals

NO. 83-CA-2160-MR

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE,
Individually — APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 81-CI-0166

WILLIAM TABLER, Architect,
and DOVER ELEVATOR COMPANY,
HARLEY HOTELS, INC., AND
RUSSELL HALCOMB — APPELLEES

REVERSING AND REMANDING

BEFORE: HAYES, CHIEF JUDGE, CLAYTON and HOWARD, Judges. CLAYTON, JUDGE. Mary L.

Wallace, individually and as administratrix of the estate of William Wallace, appeals from a summary judgment of the Fayette Circuit Court dismissing her action for the wrongful death of her late husband, mortally injured while attempting to repair an elevator at the Harley Hotel in Lexington, Kentucky. By that judgment, the lower court gave retroactive effect to the recent Kentucky decision *Carney* v. *Moody*, Ky., 646 S.W.2d 40 (1983), to find that the action by Wallace against the designing architect, elevator company, and hotel was barred by the statute of repose found at KRS 413.135, commonly referred to as the "architect's no-action statute." According to the provisions of that statute,

> Actions for damages arising out of injury resulting from construction of improvements to real estate. - - (1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, inspection or construction of any such improvement after the expiration of five (5) years following, the substantial completion of such improvement.

The sole question we are presented with on appeal is whether KRS 413.135 violates the equal protection provisions of the Constitution of Kentucky and the Constitution of the United States.[1] Neither *Saylor* v. *Hall*, Ky., 497 S.W.2d 218 (1973), nor *Carney* v. *Moody, supra*, resolves this complex question. Both of those opinions analyze KRS 413.135 under Sections 14, 54, and 241 of the Kentucky Constitution prohibiting the abolition of legal remedies for wrongful death, personal injury, property damage or defamation. Thus, their legal analysis is clearly distinguishable. We are not, however, without guidance in this matter. Approximately twenty states have now considered the constitutionality of no-action statutes materially similar to our own. For decisions holding such statutes to be unconstitutional see *McClanahan* v. *American Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo., 1980); *Fujioka* v. *Kann*, 514 P.2d 568 (Hawaii 1973); *Skinner* v. *Anderson*, 231 N.E.2d 588 (Ill. 1967); *Pacific Indem. Co.* v. *Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977); *Loyal Order of the Moose Lodge 1785* v. *Cavaness*, 563 P.2d 143 (Okla. 1977); *Broome* v. *Truluck*, 241 S.E.2d 739 (S.C. 1978); *Kallas Millwork Corp.* v. *Square D. Co.*, 225 N.W.2d

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[1]The numerous arguments raised by the appellees concerning preservation of the constitutional issue, failure to notify the Attorney General, and standing of the appellant to sue have been reviewed and are considered to be nonpersuasive. They will not be further discussed in this opinion.

454 (Wis. 1975); *Phillips* v. *ABC Builders, Inc.*, 611 P.2d 821 (Who. 1980); *State Farm Fire and Casualty Co.* v. *All Electric, Inc.*, 660 P.2d 995 (Nev. 1953). For decisions holding such statutes to be constitutional see *Carter* v. *Hartenstein*, 455 S.W.2d 918 (Ark. 1970); *Burmaster* v. *Gravity Drainage District No. 2 of Parish of St. Charles*, 366 So.2d 1381 (La. 1978); *Bouser* v. *Lincoln Park*, 268 N.W.2d 332 (Mich. App. 1978); *Reeves* v. *Ille Electric Co.*, 551 P.2d 647 (Mont. 1976); *Rosenberg* v. *North Bergen*, 293 A.2d 662 (N.J. 1972); *Howell* v. *Burk, 568 P.2d 214 (N.M. App. 1977); Joseph* v. *Burns*, 491 P.2d 108 (Ore. 1971); *Hill* v. *Forrest & Cotton, Inc.*, 555 S.W.2d 145 (Tex. Civ. App. 1977); *Good* v. *Christenson*, 527 P.2d 223 (Utah 1974); *Yakima Fruit & Cold Storage Co.* v. *Central Heating & Plumbing Co.*, 503 P.2d 103 (Wash. 1972). While the no-action statutes involved in these decisions may vary from state to state in their language and the length of their time limitations, these variations are for the most part insignificant, "a distinguishing factor of no importance." *Phillips* v. *ABC Builders*, Inc., *supra*, at 825. The two exceptions to the material uniformity among the various statutes are found in the Oregon and Washington statutes which, unlike the Kentucky statute, do not enumerate a class, but instead declare all persons involved in construction of the improvement immune from suit after seven years. *Id. at 380.*

In essence, KRS 413.135 imposes a five year time limit upon actions against architects, engineers, or builders for injury or death arising from any deficiency in their "design, planning, supervision, inspection or construction of any improvement to real property." No legal action may be brought against these individuals more than five years after the substantial completion of the improvement. That their negligence may have been the sole proximate cause of property damage, personal injury, or death is immaterial. They may not be successfully sued in tort or in contract after the five year time period has run. In this sense, KRS 413.135 is a statute of repose and may be said to bar a cause of action before it exists, for persons injured six, seven, or any number of years greater than five years following substantial completion of the improvement forfeit their potential cause of action before it accrues, before they are injured. *See Kallas Millwork Corp.* v. *Square D. Co., supra,* at 457. In contrast, the traditional statute of limitations normally begins to run upon the plaintiff's discovery of his injury and is intended as a means of ensuring that plaintiffs diligently pursue their rights. Under KRS 413.135 discovery or even the existence of injury is unimportant and diligent prosecution of an untimely action is futile.

The origin of KRS 413.135 and other such statutes of repose can be found as the indirect result of the landmark decision *MacPherson* v. *Buick Motor*

Co., 111 N.E. 1050 (N.Y. 1916). Prior to *MacPherson, supra*, the doctrine of "privity of contract" established in the mid-1800's by *Winterbottom* v. *Wright*, 10 M. & W. 109 (Eng. 1842) denied third-party plaintiffs recovery against an architect or engineer responsible for design or construction of a defective structure once that structure had been completed and accepted by the owner *MacPherson, supra*, and its progeny, however, abolished the defense of "no privity of contract," thus exposing the presently involved professionals to potential interminable liability. *See Limitation of Action Statutes for Architects and Builders -Blueprints for Non-Action*, 18 Cath. U.L. Rev. 361 (1969); *Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers and Builders*, 60 K.L.J. 462 (1971-72); Annot 93 A.L.R.3rd 1249 (1979). Their reaction to this expanded responsibility was to use their separate professional organizations to lobby for model legislation such as KRS 413.135. By 1969, over thirty states had adopted such statutes. *See Loyal Order of Moose Lodge 1785* v. *Cavaness, supra*, at 145. However, following the initial legislative surge to enact no-action statutes during the 1960's, they became increasingly subject to constitutional attack on three bases: (1) that they abrogate a common law right, (2) that they are special legislation, (3) that they violate the equal protection clause of the 14th Amendment to the United States Constitution. At present, we are concerned solely with the complexities of the equal

protection provisions of the Kentucky and United States Constitution.

Equal protection of the law is a constitutional guarantee which does not readily lend itself to patent formuli. Its parameters are instead, best developed on a case-by-case basis within the confines of facts giving rise to actual controversies. Numerous courts, however, have attempted to set forth a basic understanding of the standards involved. In *Fujioka* v. *Kann*, *supra*, an early decision declaring the architect's no-action statute of Hawaii unconstitutional, it is stated that " 'What is prohibited by the equal protection guaranty is class legislation, discriminating against some and favoring others:" *Id.* at 570 (citing *State* v. *Johnston*, 456 P.2d 805, 810 (Hawaii 1969).) *Fujioka* continues to add that " 'in exercising this right to classify in order to achieve social goals the legislature may not act arbitrarily; that is, the classification of a particular group as a subject for regulation must be reasonable in relation to the purpose of the legislation,' " *Id.* at 571 (citing *Hasegawa* v. *Maui Pineapple Co.*, 475 P.2d 679, 681 (Hawaii 1970)). The test to find a statute invalid under the equal protection clause has also been expressed in *Kallas Millwork Corporation* v. *Square D. Co.*, *supra*, a Wisconsin decision holding that state's no-action statute unconstitutional, as being "whether there exists any rational and reasonable justification for the classification." *Id.* at 458 (citing *State* v. *Duffy*, 194 N.W.2d 624 (Wisc. 1972)). *Kallas* continues to add

that "[o]nly if the classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will the classification be held violative of constitutional guarantees of equal protection." *Id.* (citing *Simanco, Inc.*, v. *Dep't of Revenue*, 203 N.W.2d 648, (Wisc. 1973)). Kentucky's highest appellate court, has described the guarantee thusly. "there must be a substantial reason why a particular law is made to operate upon a class of citizens and not generally upon all." *Walters* v. *Binder*, Ky., 435 S.W.2d 464, 466 (1968) (citing *Dawson* v. *Hamilton*, Ky., 314 S.W.2d 532 (1968)). Put otherwise, " 'For a law to be general in its constitutional sense it must meet the following requirements: (1) It must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification.'" *Id.* (citing *Schoo* v. *Rose*, Ky., 270 S.W.2d 940 (1954)). It is the second of the two criteria upon which we focus our attention. Specifically, we ask whether the classification created by KRS 413.135 is rational in fact. In layman's terms, are there any real differences to distinguish the favored class, architects, engineers, and builders, from other classes excluded from the statute's protection, in this case, persons in control of the real property and tenants (specifically excluded under subsection 4 of KRS 413.135) and materialmen (recently excluded from protection by the Kentucky Supreme Court Decision *In re: Beverly Hills Fire litigation*, Ky., S.W.2d_____, 31 K.L.S. 7 (May 31, 1984). After a thorough review of the cases on both

sides of the issue we conclude that there is no rational basis to exclude materialmen, and controlling owners and tenants from the immunity granted architects, engineers, and builders by KRS 413.135.

Of the many cases upholding statutes such as KRS 413.135, few vigorously analyze the reasons potentially supporting the class distinctions created. Most of these opinions seem content simply to recognize the general power of the legislature to classify while repeating general prescriptions for analyzing the guarantees of equal protection *See Kallas Millwork Corp.* v. *Square D. Co., supra,* at 460 (criticizing *Rosenberg* v. *Town of North Bergen, supra;* and *Yakima Fruit & Cold Storage Co.* v. *Central Heating & Plumbing Co., supra;* for their failure to come to grips with the real problem presented); *Pacific Indemnity Company* v. *Thompson-Yaeger, Inc., supra,* at 555 ("We have reviewed these cases carefully are are convinced that the better reasoned position is embodied in the decisions which hold such statutes to be unconstitutional. . . ."); *Phillips* v. *ABC Builders, Inc., supra,* at 830 (condemning *Carter* v. *Hartenstein, supra; Reeves* v. *Ille Electric Co., supra;* and *Burmaster* v. *Gravity Drainage District No. 2 of Parish of St. Charles, supra;* as being conclusory). Of the remaining cases more completely examing the issue, the most thorough constitutional defense of this type of statute is found in *Freezer Storage, Inc.* v. *Armstrong Cork Co.*, 341 A.2d 184 (Pa. Supr. Ct. 1975). In that decision, the Pennsylvania court advanced the follow-

ing rationale to distinguish between materialmen and architects, engineers and contractors.

> . . .[T]he distinction drawn between the two classes is rational. Suppliers who typically produce items by the thousands can easily maintain high quality control standards in the controlled environment of the factory. A builder on the other hand, can pre-test his designs and construction only in limited ways - actual use in the years following construction is the only real test. Further, every building is unique and far more complex than its component parts.
>
> ★ ★ ★ ★ ★ ★
>
> The legislature can rationally conclude that the conditions under which builders work are sufficiently difficult that limitations should be placed on their liabilities but not on the liabilities of suppliers.

Id. at 719.

We cannot accept this conclusion. The high quality of control in the factory ends at the factory gates. Once a material supplier's goods are taken to the site and incorporated into the structure, the supplier is at the mercy of those who construct, maintain and control the property. Suppliers assume the exact risks of the protected class yet receive no protection under KRS 413.135. *See Phillips* v *ABC Builders, Inc., supra,* at 830. It is the identical nature of the risk that

the separate, but similarly situated, groups are exposed to and not the conditions under which they work that is controlling. Architects, engineers, and contractors all are licensed professionals who undergo extensive technical training solely for the purpose of dealing with the unique nature of the structures they design and construct. We fail to see any rational basis for distinguishing them from suppliers or materialmen whose products, while uniform, are incorporated into unique structures, thus becoming uniquely used and placed under the control of third party owners and tenants. For further criticism of *Freezer Storage, supra, See Loyal Order of Moose Lodge 1785, supra*, at 147.

We do not stand alone in this conclusion. The absence of any rational distinction between the above groups has often been noted. In *Skinner* v. *Anderson, supra*, at 591, the court in a frequently quoted passage states that,

> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement.

> But if construction for which an architect or contractor was responsible, immunity is granted. It can not be said that the one event is more likely than the other to occur within four years after construction is completed.

We believe this reasoning to be sound. We join in this view and now reverse.

The judgment of the Fayette Circuit Court is reversed and this cause is remanded for further proceedings consistent with this opinion.

HAYES, CHIEF JUDGE, CONCURS.

HOWARD, JUDGE, DISSENTS.

HOWARD, JUDGE, DISSENTING: I respectfully dissent from the majority opinion because the "equal protection of the laws" argument was not preserved for review. This issue was never raised before the trial court, and under well-considered and long-standing precedents, it cannot be considered for the first time on appeal. *Pittsburg and Midway Coal Mining Co.* v. *Rushing*, Ky., 456 S.W.2d 816 (1969); *Akers* v. *Floyd County Fiscal Court*, Ky., 556 S.W.2d 146 (1977). Therefore, I would affirm the judgment of the trial court.

ATTORNEY FOR APPELLANT:

Peter Perlman
PERLMAN & GARMER, P.S.C.
388 South Broadway
Lexington, Kentucky 40508

ATTORNEYS FOR APPELLEES:

David L. Armstrong
Attorney General
Capitol Building
Frankfort, Kentucky 40601

Calvin R. Fulkerson
Ronald Green
W. T. Adkins
710 First National Building
Lexington, Kentucky 40507

Robert H. Measle
Suite Four-A
Citizens Bank Square
Lexington, Kentucky 40507

James Carroll
109 Short Street
Harrodsburg, Kentucky 40330

APPENDIX E

FILED
SEP 26 1984

JOHN C. SCOTT
CLERK
SUPREME COURT

SUPREME COURT
OF THE
COMMONWEALTH OF KENTUCKY

NO. _____

WILLIAM B. TABLER, ARCHITECT
and DOVER ELEVATOR
COMPANY — MOVANTS

VS:

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE,
Individually — RESPONDENTS

MOTION FOR DISCRETIONARY REVIEW

FROM COURT OF APPEALS OF KENTUCKY
(83-CA-2160-MR)

W. T. Adkins
Ronald L. Green

BOEHL STOPHER GRAVES & DEINDOERFER
444 West Second Street
Lexington, KY 40508
Attorneys for Movant,
William B. Tabler, Architect

Robert H. Measle
FOWLER, MEASLE & BELL
Suite 4-A
Citizens Bank Square
Lexington, KY 40507
Attorneys for Movant,
Dover Elevator Company

This is to certify that true copies of the within Motion for Discretionary Review have been served on the other parties and on the Clerk of the Court whose decision is sought to be reviewed, by mailing same to Hon. Peter Perlman, Perlman & Garmer, P.S.C., 388 South Broadway, Lexington, KY 40508, Attorney for Respondents, Mary L. Wallace, Administratrix of the Estate of William Wallace, and Mary L. Wallace, Individually; Hon. John C. Scott, Clerk, Court of Appeals of Kentucky, 403 Wapping Street, Frankfort, KY 40601; Hon. James E. Keller, Judge, 22nd Circuit, Fayette Circuit Court, First Division, Fayette County Courthouse, Lexington, KY 40507; Hon. Robert M. True, Clerk, Fayette Circuit Court, Fayette County Courthouse, Lexington, KY 40507; and that the record on appeal has not been removed from the offices of the Clerk of the Supreme Court of the Commonwealth of Kentucky or from the offices of the Clerk of the Kentucky Court of Appeals; this the 26th day of September, 1984.

/s/ Robert H. Measle
ATTORNEYS FOR MOVANTS

SUPREME COURT
OF THE
COMMONWEALTH OF KENTUCKY

NO._____

WILLIAM B. TABLER, ARCHITECT
and DOVER ELEVATOR
COMPANY MOVANTS

VS:

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE,
Individually RESPONDENTS

MOTION FOR DISCRETIONARY REVIEW

FROM COURT OF APPEALS OF KENTUCKY
(83-CA-2160-MR)

Come the Movants, William B. Tabler, Architect, and Dover Elevator Company, and pursuant to Civil Rule 76.20 of the Kentucky Rules of Civil Procedure, move for a Discretionary Review by the Supreme Court of the Commonwealth of Kentucky, of the Decision, Opinion and Order of the Court of Appeals in that Appeal numbered 81-CI-0166, and in support of said Motion state as follows:

(A) MOVANTS.

William B. Tabler, Architect, represented by:

W. T. Adkins, Esq.
Ronald L. Green, Esq.
BOEHL STOPHER GRAVES & DEINDOERFER

Dover Elevator Company, represented by:

Robert H. Measle, Esq.
FOWLER, MEASLE & BELL

RESPONDENTS.

Mary L. Wallace, Administratrix of the Estate of William Wallace, and Mary L. Wallace, Individually, represented by:

Peter Perlman, Esq.
PETER PERLMAN LAW OFFICES, P.S.C.

(B) DATE OF OPINION.

The Opinion, Order and Judgment of the Court of Appeals was entered on September 7, 1984.

(C) SUPERSEDEAS BOND.

No Supersedeas Bond has been filed, as there were no damages awarded.

(D) STATEMENT OF MATERIAL FACTS.

(i) Respondent's then husband, William Wallace, suffered an injury on January 24, 1980, while

repairing an elevator in the Harley Hotel in Lexington, Kentucky. He was an Elevator Serviceman at that time. He died on February 12, 1980, as a result of complications arising out of such injury. An Action was instituted in the Fayette Circuit Court at Lexington, Kentucky on January 19, 1981, alleging negligence in the design and construction of the elevator, said action was filed more than five years after substantial completion of the improvements at issue. The owner and an employee thereof, Harley Hotels, Inc. and Russell Halcomb, were named as Defendants below, and are listed as Appellees in the original Appeal. However, neither Harley Hotels, Inc. nor Russell Halcomb actively participated in the original Appeal.

The Fayette Circuit Court, on June 30, 1983, granted to both William B. Tabler, Architect, and Dover Elevator Company a Summary Judgment, dismissing Respondents' claims as asserted against them, holding that said claims were barred by the Statute of Limitations as set forth in KRS 413.135, known as the "Builders' and Architects' Statute."

Thereafter, for the first time, in Respondents-Appellants' brief to the Court of Appeals, the question was raised as to the constitutionality of such Builders' and Architects' Statute, the Respondents-Appellants asserting that such Statute was unconstitutional because it violated the Equal Protection Provisions of the Constitution of Kentucky and the Constitution of the United States.

(ii) QUESTIONS OF LAW INVOLVED.

(a) Movants contend that the failure of the Respondents to raise the issue of the constitutionality of the Builders' and Architects' Statute, KRS 413.135, at the Circuit Court level, waived Respondents' rights, if any, to contest the constitutionality of such Statute at the Appellate Court level since such error was not preserved by first presenting the issue to the Trial Court.

(b) The failure of the Respondents to give notice to the Attorney General of Kentucky of the claim that the Builders' Statute was unconstitutional did not follow the mandate of KRS 413.075 which requires that the Attorney General be furnished notice of such claim and be afforded the opportunity to be heard.

(c) The Respondents have no standing to raise the constitutionality of KRS 413.135.

(d) The Builders' and Architects' Statute, KRS 413.135 is constitutional and comports with equal protection.

(iii) SPECIFIC REASON OR REASONS WHY THE JUDGMENTS SHOULD BE REVIEWED.

The Court of Appeals in passing footnote abandoned the rule that error must be preserved, repealed KRS 418.075, and dispensed with the requirement, and further abandoned the traditional test for reviewing a statute in the context of equal protection.

(a) It is well settled in Kentucky that a prerequisite for Appellate Review of an alleged error is that the ground be preserved by presenting the error to the Trial Court. *Akers* v. *Floyd Cty. Fis. Ct.*, Ky., 481 S.W.2d 146 (1972); *Bissett* v. *Goss*, Ky., 481 S.W.2d 71 (1972). The record on appeal demonstrates conclusively that such prerequisite was not satisfied in this particular case. The function of the Appellate Court (the Court of Appeals) is to review possible errors made by the Trial Court. If the Trial Court has had no opportunity to rule on the question, there is no alleged error before the Appellate Court subject to review. *Commonwealth of Kentucky, Department of Highways* v. *Williams*, Ky., 317 S.W.2d 482 (1958). The Court of Appeals in the instant case has set aside this long-standing precedent and summarily discarded it by a mere footnote contained on page 2 of its original Opinion, reversing and remanding the case, stating only that the arguments setting forth such requirement that the Trial Court be given an opportunity to rule on the question were "non-persuasive."

(b) Notice must be given to the Attorney-General of Kentucky if the constitutionality of a statute is in question as required by KRS 418.975. This clearly was not done as the record conclusively reveals. Again, the Court of Appeals, in its footnote above referred to, states that this fact also was "non-persuasive." Does the Court of Appeals, by implication, thereby overrule prior Opinions, or does it merely ignore the provisions of such statute?

(c) The statute in question cannot violate equal protection because of its barring effect, but rather the challenge is based on the fact that it bars some and does not bar others. Thus, it is those persons whose claims do not come within the statute that are prejudiced by the classification, not the Respondents. *Second Street Prop., Inc.* v. *Fiscal Ct. of Jefferson Cty.*, Ky., 445 S.W.2d 709 (1969). The Respondents therefore have no standing to assert constitutional challenge.

(d) The classification in question does not violate equal protection. The proper test is whether the classification has any conceivable or arguable rational basis in fact. It is obvious that the person in control is in a different position than those included in the statute, as such a person has an ongoing ability to inspect and repair or warn. Likewise, there exists a rational basis for excluding manufacturers and materialman. The legislature could properly conclude this group of persons are in a better position to defend themselves after a five year period, since their involvement is standardized. Those covered by the statute, on the other hand, perform custom and specialized work and, thus, defense becomes more difficult more quickly, as it is more dependent on memory. The Court of Appeals ignored the fact that the primary purpose of statutes of limitation is repose, and the classification is reasonably related to such purpose.

(E) A copy of the Summary Judgment of the Fayette Circuit Court, dismissing Respondents-Plaintiffs' Cause of Action in Civil Action No. 81-CI-0166, is attached hereto as Exhibit A.

The Opinion of the Court of Appeals, reversing and remanding said Cause of Action to the Fayette Circuit Court, dated September 7 1984, is attached hereto as Exhibit B.

(F) The Movants do not have a Petition for Rehearing or Motion for Reconsideration pending in the Court of Appeals.

(G) No other party to these proceedings has a Petition for Rehearing or Motion for Reconsideration pending in the Court of Appeals.

For these reasons, the Opinion of the Court of Appeals compels discretionary review

Respectfully submitted,
FOWLER, MEASLE & BELL
Suite 4-A
Citizens Bank Square
Lexington, Kentucky 40507
Telephone: 606/252-6721

BY: /s/Robert H. Measle
ROBERT H. MEASLE

APPENDIX F

SUPREME COURT OF KENTUCKY
84-SC-844-D
(83-CA-2160-MR)

WILLIAM B. TABLER, ARCHITECT
AND DOVER ELEVATOR COMPANY MOVANTS

V. FAYETTE CIRCUIT COURT
81-01-0166

MARY L. WALLACE, ADMINISTRATRIX
OF THE ESTATE OF WILLIAM WALLACE,
AND MARY L. WALLACE,
INDIVIDUALLY RESPONDENT

ORDER GRANTING DISCRETIONARY REVIEW

The motion of the movants for a review of the decision of the Court of Appeals is granted.

The clerk of the Court of Appeals is directed to transfer to the clerk of the Supreme Court the entire record in this proceeding.

ENTERED January 9, 1985.

/s/Robert F. Stephens
Chief Justice

APPENDIX G

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE,
Individually — PLAINTIFFS

VS. — OPINION — NO. 81-CI-166

HARLEY HOTELS, INC., RUSSELL
HALCOMB, WILLIAM B. TABLER,
ARCHITECT, and DOVER
ELEVATOR COMPANY — DEFENDANTS

★ ★ ★ ★ ★ ★

This matter is before the Court on the motion for summary judgment of the defendants, Dover Elevator Company and William B. Tabler, Architect. The defendants assert that the plaintiffs' claims against them are barred by the applicable statute of limitations, K.R.S. 413.135. We agree and sustain.

There is no genuine issue as to any material fact and the dispositive issue of law is whether the Supreme Court of Kentucky's decision in *Carney, et*

al, v. *Moody, et al*, Ky., 646 S.W. 2d 40 (1983) shall be applied retroactively in this case.

Saylor v. *Hall*, Ky., 497 S.W. 2d 218, held that under Sections 14, 54, and 241 of the Kentucky Constitution, the five year statutes of limitations [K.R.S. 413.120 (14) and 413.135] enacted in 1964 and 1966 could not operate to bar recovery for a death that occurred in 1969 as a result of a defect in a building constructed in 1955. *Carney, et al*, v. *Moody, et al*, supra, involved the same legal issues but with respect to injuries occurring in 1978 as a result of defective construction that took place in 1971. In *Saylor* the negligent conduct of the builder preceded the enactment of the statutes, whereas in *Carney* the statutes were in force when the building was constructed. The Court in *Carney* stated that this factual distinction was without legal significance, 646 S.W. 2d at 40; but, the Court then concluded that the statutes did not violate the Constitution of Kentucky thereby overruling its prior decision.[1]

While the Court's new ruling on the constitutionality of the statutes was applied retroactively in the overruling case, *Carney, et al*, v. *Moody, et al*,

---

[1]We agree that the Court in *Saylor* v. *Hall*, supra confined its ruling of constitutionality to the precise facts to which it was applied in that case. The practical effect of the decision among the Bench and Bar however was to declare the subject statutes unconstitutional.

supra, this is not necessarily an indication that the decision would be given general retroactive effect in other cases. Annot., 10 A.L.R. 3d 1371, 1382 (1966). Generally in civil cases the judicial overruling of a precedent has both prospective and retroactive effects unless the overruling decision declares that it should have only prospective effect, which the Court overruling its prior decision generally has the power to do. 20 AmJur 2d, Courts, Sec. 233.

Courts have recognized certain exceptions to the general rule. A decision overruling a judicial precedent will not be given retroactive effect: (1) Where it imposes a hardship on those who have justifiably relied on the overruled case; (2) Where the overruled precedent was one of procedural law; (3) Where the overruling case involves the judicial construction of a statute, and (4) Where rights, especially contractual rights, duly acquired pursuant to the law as it prevailed prior to the overruling decision would be impaired thereby. See 20 AmJur 2d, Courts, Sections 233, 234, and 235.

The highest Court in this jurisdiction has recognized the exception that an overruling decision will not be given retroactive effect where to do so would impair the obligation of contracts entered into, or rights acquired, in reliance on the overruled case. *Great Atlantic & Pacific Tea Co.* v. *Scanlon*, Ky., 100 S.W. 2d 223 (1936); *Hanks* v. *McDanell*, Ky., 210 S.W.2d 784, (1948). The other exceptions -- that the

judicial construction of a statute and an overruling case involving procedural law will not be given retroactive effect -- were rejected in *Great Atlantic & Pacific Tea Co.* v. *Scanlon*, supra. Therein, the Court applied retroactively an overruling decision involving a statute of limitations, procedural law.

We find no reason to depart from precedent in this jurisdiction; therefore, we are compelled to give the overruling decision of *Carney, et al*, v. *Moody, et al*, supra, retroactive effect and apply it to this case. Accordingly, we find that the plaintiffs' claim against the moving defendants are barred by the subject statute of limitations.

The attorneys will submit an Order in conformity with this Opinion.

/s/James E. Keller
JUDGE, FAYETTE CIRCUIT COURT

CERTIFICATE

This will certify that the foregoing opinion was served upon the parties by mailing a copy to: Hon. William R. Garmer, Perlman & Garmer, 388 South Broadway, Lexington, KY 40508, Attorneys for Plaintiffs; Hon. James S. Carroll, Mercer Federal Annex, 109 Short Street, Harrodsburg, Kentucky 40330, At-

torney for Defendants, Harley Hotels, Inc. and Russell Halcomb; Hon. Calvin R. Fulkerson, 710 First National Bldg., Lexington, KY 40507, Attorneys for Defendant William B. Tabler; and Hon. Robert H. Measle, Fowler, Measle & Bell, Suite Four A, Citizens Bank Square, Lexington, Kentucky 40507-1680, Attorney for Defendant Dover Elevator Company, this the 22 day of June, 1983.

By: Carol Pendergrass, D.C.

APPENDIX H

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

JUL 15, 1983

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM
WALLACE, and MARY L. WALLACE,
Individually PLAINTIFFS/APPELLANT

NOTICE OF APPEAL VS. No. 81-CI-0166

WILLIAM B. TABLER, Architect,
and DOVER ELEVATOR
COMPANY DEFENDANTS/APPELLEES

and

HARLEY HOTELS, INC., AND
RUSSELL HALCOMB DEFENDANTS

Notice is hereby given that the Plaintiffs, Mary L. Wallace, Administratrix of the Estate of William Wallace, and Mary L. Wallace, Individually, hereby appeal to the Court of Appeals of Kentucky from the

trial court's final and appealable Order and Judgment granting the Defendants, William B. Tabler, Architect, and Dover Elevator Company's Motion for Summary Judgment entered by this court on June 30, 1983.

The names of the appellees in the action are: Defendant-Appellee, William B. Tabler, Architect, and, Defendant-Appellee, Dover Elevator Company.

PERLMAN & GARMER, P.S.C.
388 SOUTH BROADWAY
LEXINGTON, KENTUCKY
40508

A TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT
BY: Paula Smith Deputy

BY:/s/ Peter Perlman
PETER PERLMAN

NOTICE OF ENTRY
AND CERTIFICATION OF SERVICE

I, Robert M. True, Clerk of the Fayette Circuit Court, hereby certify that the foregoing Notice of Ap-

peal was entered in this Court and a true copy thereof was mailed to the following:

Hon. James S. Carroll
Mercer Federal Annex
109 Short Street
Harrodsburg, Kentucky 40330

Hon. Calvin R. Fulkerson
710 First National Building
Lexington, Kentucky 40507

Hon. Robert H. Measle
Suite Four A
Citizens Bank Square
Lexington, Kentucky 40507-1680

Hon. James E. Keller
Judge Fayette Circuit Court
First Division
Fayette County Courthouse

Hon. John C. Scott, Clerk
Court of Appeals of Kentucky
Bush Building
403 Wapping Street
Frankfort, Kentucky 40601

on this 15th day of July, 1983.

/s/Robert M. True by Warren Smith
ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

APPENDIX I

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
FILE NO. 83-CA-2160-MR

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE,
Individually PLAINTIFF/APPELLANT

VS:

WILLIAM B. TABLER, Architect,
and DOVER ELEVATOR
COMPANY DEFENDANTS/APPELLEES

AND

HARLEY HOTELS, INC., and
RUSSELL HALCOMB DEFENDANTS

NOTICE OF INTENT NOT TO INTERVENE

Comes now the Commonwealth of Kentucky, by counsel, and hereby acknowledges receipt of the Notice of Appeal and the Brief in the above-styled action, and further informs this Court and the parties hereto that the Attorney General does not intend to intervene.

Respectfully submitted,

STEVEN L. BESHEAR
ATTORNEY GENERAL

WILLIAM L. DAVIS
Director of Administrative Law
and Civil Litigation Branch
Room 28 The Capitol
Frankfort, Kentucky 40601-3494
Telephone: (502) 564-4040

COUNSEL FOR ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Intent Not to Intervene was mailed, postage prepaid, this 25th day of October, 1983, to: Honorable Peter Perlman, PERLMAN & GARMER, P.S.C., 388 South Broadway, Lexington, Kentucky 40508, Attorney for Appellant, Mary L. Wallace; Honorable James L. Keller, Judge, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky 40507; Honorable Robert M. True, Clerk, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky 40507; Honorable Calvin R. Fulkerson, 710

First National Building, Lexington, Kentucky 40507, Attorney for William B. Tabler, Architect; Honorable Robert H. Measle, Suite Four-A Citizens Bank Square, Lexington, Kentucky 40507, Attorney for Dover Elevator Company, Honorable James Carroll, 109 Short Street, Harrodsburg, Kentucky 40330, Attorney for Harley Hotels, Inc. and Russsell Halcomb.

/s/ William L. Davis
William L. Davis
Director, Administrative Law
and Civil Litigation Branch

APPENDIX J

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL PROVISIONS INVOLVED

U.S. CONSTITUTION, FOURTEENTH AMENDMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY RULES OF CIVIL PROCEDURE

CR 24.03

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the General Assembly affecting the public interest is drawn in question in any action to which the State or an officer, agency, or employe thereof is not a

party, the movant shall serve notice of the motion upon the Attorney-General.

CR 46

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

CR 76.12 (IV)

(IV) An "ARGUMENT" conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

KENTUCKY STATUTES

KRS 418.070

Necessary parties - Notice to attorney general. -When declaratory relief is sought, all persons shall be

made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a statute, the attorney general of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the petition and be entitled to be heard.

Supreme Court, U.S.
FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1998

In the Supreme Court of the United States

OCTOBER TERM 1986

WILLIAM B. TABLER AND
DOVER ELEVATOR COMPANY,
PETITIONERS

v.

MARY L. WALLACE, ET AL.
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

Hon. Peter Perlman
PETER PERLMAN LAW OFFICES, P.S.C.
388 South Broadway
Lexington, Kentucky 40508
Counsel of Record for Respondent

81 pp

QUESTION PRESENTED

Whether the Kentucky Supreme Court is the final interpreter of Kentucky judicial procedure, when no fundamental right is affected and no guarantee of the United States Constitution is violated.

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In the Supreme Court of the United States

OCTOBER TERM 1986

WILLIAM B. TABLER AND
DOVER ELEVATOR COMPANY,
PETITIONERS

v.

MARY L. WALLACE, ET AL.
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

The Respondent, Mary L. Wallace, as Administratrix of the Estate of William Wallace and individually, respectfully responds by Brief in Opposition to the Petitition of William B. Tabler and Dover Elevator Company for Writ of Certiorari to the Kentucky Supreme Court.

STATEMENT

On January 19, 1981, Respondent Mary Wallace initiated a cause of action for the wrongful death of her husband, William Wallace, against the Petitioners, William B. Tabler and Dover Elevator Company. On

January 30, 1983, Summary Judgment was entered in favor of the Petitioners based on the statute of limitations embodied in Ky. Rev. Stat. 413.135. App. 57a. On appeal, the Kentucky Court of Appeals reversed the Judgment of the trial court and held Ky. Rev. Stat. 413.135 to be unconstitutional under Section 59 of the Kentucky Constitution which prohibits "Local and Special Legislation.*" App. 44a. On November 21, 1985, the Supreme Court of Kentucky affirmed the holding of the Kentucky Court of Appeals and remanded the Respondent's cause of action to the trial court for further proceedings. App. 1a.

Throughout the proceedings in the Kentucky appellate courts, the Petitioners alleged that the Respondent had not preserved the issue of whether Ky. Rev. Stat. 413.135 violated the Kentucky Constitution. The issue was raised in both appellate briefs and upon oral argument. Most recently, the Kentucky Supreme Court denied the Petitioners' Petition for Rehearing, which was based solely on the issue of preservation. App. 39a. The Petitioners have been heard repeatedly on this issue and have not suffered from any lack of process.

---

*The opinion of the Kentucky Supreme Court describes § 59 of the Kentucky Constitution as being similar to, but narrower than, the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. App. 8a.

THE PETITION SHOULD BE DENIED

The Respondent reaffirms the position taken in her response to Petitioners' Petition for Rehearing to the Kentucky Supreme Court that the Constitutionality of Ky. Rev. Stat. 413.135 was properly raised and preserved at the trial court level. App. 30a.

In alleging that the Respondent failed to properly preserve the issue of the constitutionality of Ky. Rev. Stat. 413.135, the Petitioners rely upon Kentucky Civil Rule 46 and Kentucky decisional law. However, the Petitioners fail to report two judicially-recognized exceptions to these authorities. Kentucky's highest court, as the final interpreter of state legislative acts with reference to the Kentucky Constitution, may waive a lack of preservation of error when the constitutionality of an act is in question. *Rash* v. *Louisville & Jefferson Co. Metro. Sewer District,* 309 Ky. 442, 217 S.W.2d 232 (1949). In *Rash,* Kentucky's highest court stated:

> . . . [W]e are of opinion that they [Kentucky Revised Statute 76.030(5); 76.060] violate other provisions of the Constitution. These grounds have not been raised by counsel. But having final authority to determine the constitutional validity of legislative acts, we are impelled by this responsibility to examine the Act for ourselves before declaring it valid.

Rash, supra, at 235.

In addition, Kentucky's highest court has stated that where it is necessary to avert manifest injustice, it will entertain an argument not first presented to the trial court. *Pittsburgh & Midway Coal Mining Co.* v. *Rushing,* 456 S.W.2d 816 (Ky. 1969). Similarly, this Court has stated that rules of practice, which limit judicial determination of constitutional issues, fall short of the status of principles ordained by the Constitution and may be subject to exceptions where there are weighty countervailing policies. *United States* v. *Raines,* 362 U.S. 17 (1960).

The Petitioners also allege a failure to comply with Ky. Rev. Stat. 418.070 and Kentucky Civil Rule 24.03 which require the timely notification of the Kentucky Attorney General when the constitutionality of a Kentucky statute is in issue. The Attorney General notified all interested parties of his intent not to intervene on October 25, 1983. App. 60a. The Attorney General's decision not to intervene rendered the Petitioners' argument moot and without merit. In addition, the Petitioners have no standing to raise this issue. The Kentucky statutory scheme regarding notification of the Attorney General is not a right which inures to the benefit of the Petitioners. The Petitioners had no right to rely upon the Attorney General's intervention, and when he did not intervene, the Petitioners certainly suffered no lack of due process.

THE FOURTEENTH AMENDMENT GUARANTEE OF DUE PROCESS HAS NOT BEEN VIOLATED.

In a wide variety of civil and criminal cases, this Court has consistently held that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. *See Patterson* v. *New York*, 432 U.S. 197 (1977); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.*, 284 U.S. 151 (1931); *Dohany* v. *Rogers*, 281 U.S. 362 (1930). Further, the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. *Hardware Dealers, supra*. Traditionally, the requirements of the due process clause are satisfied if one has reasonable notice and an opportunity to be heard. *Dohany, supra*. Similarly, a state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of liberty or justice ranked as fundamental, such as the requirements of notice and hearing. *Patterson, supra*. The errors complained of by the Petitioners are purely procedural in nature and are insufficient to raise a federal question under the due process clause of the Fourteenth Amendment.

The Petitioners' argument that the Kentucky Supreme Court failed to decide the issue of preservation is meritless. The Petitioners have not shown how

they would be prejudiced by simply having to defend the Respondent's wrongful death action on the merits, without the shield of a statute which has been declared unconstitutional. The interpretation of procedural due process sought by the Petitioners would deprive the Respondent of her right to substantive due process.

CONCLUSION

The Petition for Writ of Certiorari fails to show the existence of a federal question. Wherefore, Respondent respectfully requests that the petition be denied.

Respectfully Submitted,

Peter Perlman
PETER PERLMAN LAW OFFICES, P.S.C.
388 South Broadway
Lexington, Kentucky 40508

Counsel of Record for Respondent

APPENDIX

APPENDIX

APPENDIX A

RENDERED: November 21, 1985
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

84-SC-844-DG
85-SC-63-TRG

WILLIAM B. TABLER, ARCHITECT
and DOVER ELEVATOR COMPANY MOVANTS

ON REVIEW FROM COURT OF APPEALS

V. #83-CA-2160-MR

(Fayette Circuit Court #81-CI-1066)

MARY L. WALLACE, ADMINISTRATRIX
OF THE ESTATE OF WILLIAM WALLACE,
and MARY L. WALLACE,
INDIVIDUALLY RESPONDENTS

AND

GENERAL ELECTRIC COMPANY,
ARKWRIGHT-BOSTON MANUFACTURERS,
MUTUAL INSURANCE COMPANY, and
INDUSTRIAL RISK INSURERS APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT

V. HON. BENJAMIN F. SHOBE, JUDGE
NO. 79-CI-01275

NUCOR CORPORATION,
HARMAN & CONWAY, INC.,
JACOB A. HARMAN, POLK
CONWAY, and GARST-RECEVEUR
CONSTRUCTION COMPANY, INC. APPELLEES

OPINION OF THE COURT BY JUSTICE LEIBSON

AFFIRMING IN PART/REVERSING IN PART

In these two consolidated cases[1] we again take up the issue of the constitutionality of KRS 413.135, the "no action" statute which provides those persons engaged in the "design, planning, supervision, inspection or construction of any improvement to real property" with immunity from suit for damages or injury caused by any deficiency after the expiration of five years following the substantial completion of such improvement.

In the first case, *Tabler* v. *Wallace,* a maintenance man sustained fatal injury while servicing an elevator in the Harley Hotel in Lexington, Kentucky. He was crushed between the top of the elevator and the roof of the elevator shaft. The Estate's complaint charges that the overall design of the elevator and shaft was negligent and unreasonably dangerous because the clearance between the two was deficient and inadequate in terms of industry codes and safety standards. The Estate sued Dover Elevator Company, whose predecessor sold and installed the elevator and designed the shaft, and Tabler, the architect who approved the design of the shaft in which the elevator was housed.

---

[1]These cases involve multiple parties, and their roles are reversed from one case to the other. To simplify we will refer to the cases as *Tabler* v. *Wallace* and *General Electric* v. *Nucor,* and to the parties in their roles as plaintiff and defendants.

In the second case, *General Electric* v. *Nucor*, the loss occurred because of the collapse of the roof of a warehouse of the General Electric Company in Louisville, Kentucky. The collapse occurred because four steel beams, or trusses, intended to support the roof, failed to do so. Nucor had designed the roof and its components, including the trusses, to comply with specifications provided to it. After the design process was completed, Nucor used a standardized computer program to determine which trusses to manufacture. A Nucor employee admitted that he erred in recording a load number specified in the design on the shop list utilized to prepare the trusses. The result was that the trusses were fabricated to only one half the strength required by the design. On July 13, 1977, one of the defective trusses failed, tearing the roof and causing extensive damages. Four weeks later another defective truss collapsed causing further extensive damage to the warehouse and to inventory.

Garst-Receveur Construction Company was the builder employed by General Electric to construct the warehouse. Harmon and Conway, Inc. was the manufacturer's representative for Nucor in the Louisville area. Garst-Receveur entered into a purchase order contract with Harmon and Conway which required Harmon and Company to "furnish all steel joists and joist girders," including the trusses which failed. Harmon and Conway then entered a standard purchase order with Nucor. Garst-Receveur, the builder, and

Harmon and Conway, the supplier, were sued along with Nucor.[2]

The litigation in both *Tabler* v. *Wallace* and *General Electric* v. *Nucor* followed a similar course. In neither did the defendants attempt to plead KRS 413.135, the architects and builders "no action" statute, in response to the original complaint. Initially, in both cases, the defendants assumed that the statute was unconstitutional because our decision in *Saylor* v. *Hall*, Ky., 497 S.W.2d 218 (1973) held that it violated Sections 14, 54 and 241 of the Kentucky Constitution, which restricts legislative power to abolish or limit causes of action predating the Constitution.

In both *Tabler* v. *Wallace* and *General Electric* v. *Nucor*, the defendants were permitted to amend their answers years after the litigation commenced and shortly before trial, at the "eleventh hour," based upon a perceived change in the constitutional status of KRS 413.135 announced in December 1982 in *Carney* v. *Moody*, Ky., 646 S.W.2d 40 (1982). Once the defendants were permitted to amend, in both cases the trial court then granted the defendants summary judgment on grounds that *Carney* v. *Moody* revitalized the "no action statute" because the claims were not filed within five years of completion of construction.

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[2]The warehouse roof collapsed in two stages. General Electric claimed that KRS 413.135 is not applicable to Nucor's alleged fraudulent concealment of the defect after the first partial collapse. Because of the decision of the unconstitutionality of the statute it is unnecessary that we address this further issue.

In *Tabler* v. *Wallace* the Kentucky Court of Appeals reversed the summary judgment on grounds that KRS 413.135 violates the equal protection provisions of both the constitution of Kentucky and the constitution of the United States. Both *Saylor* v. *Hall, supra,* and *Carney* v. *Moody, supra,* considered and analyzed KRS 413.135 "only" under Sections 14, 54 and 241 of the Kentucky Constitution prohibiting the abolition of legal remedies for wrongful death, personal injury, property damages or defamation, but left the question of equal protection an open matter. 497 S.W.2d at 223. The Court of Appeals considered the equal protection and special legislation arguments and concluded that this statute was nothing more than a grant of immunity, arbitrary in nature, with no reasonable basis for a separate classification.

Because of the importance of this constitutional question, we granted discretionary review.[3] The Court of Appeals then asked that we accept transfer of *General Electric* v. *Nucor,* involving the same constitutional question, pending before the Court of Appeals. We granted transfer and consolidated the cases for argument and consideration.

KRS 413.135 derives from legislation commencing in the mid-1960's drafted and promoted by three groups engaged in the construction industry: architects, en-

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[3]The Court of Appeals ruled adversely to defendants' claim that the constitutional issue was not preserved. The constitutional issue was the reason we granted discretionary review. We express no opinion on the preservation issue.

gineers, and builders. These groups were the American Institute of Architects, The National Society of Professional Engineers, and The Associated General Contractors. *See Smith,* "Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers and Builders." 60 Ky.L.J. 462 (1971-72). Within a relatively short period of time these groups succeeded in having similar legislation enacted in almost every state. The reaction has been a multitude of cases challenging the constitutionality of this legislation on equal protection grounds. In all, we have been cited to cases from thirty-one sister states[4] and several federal jurisdictions, all addressing a constitutional

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[4]*CONSTITUTIONAL: Carter* v. *Hartenstein,* 455 S.W.2d 918 (Ark. 1970), *appeal dismissed,* 401 U.S. 901 (1971); *Salinero* v. *Pon,* 177 Cal.Rptr. 204 (Cal. 1981); *Cheswold Volunteer Fire Co.* v. *Lambertson Construction Co.,* 462 A.2d 416 (Del.Supr. 1983); *Mullis* v. *Southern Company Services,* 296 S.E.2d 579 (Ga. 1982); *Twin Falls Clinic & Hospital Building Corp.* v. *Hamill,* 644 P.2d 341 (Idaho 1982); *Matayka* v. *Melia,* 456 N.E.2d 353 (Ill.App. 1983); *Beecher* v. *White,* 447 N.E.2d 622 (Ind.App. 1983); *Burmaster* v. *Gravity Drainage District No. 2,* 366 So.2d 1381 (La. 1978); *Klein* v. *Catalano,* 437 N.E.2d 514 (Mass. 1982); *O'Brien* v. *Hazelet & Erdal,* 299 N.W.2d 336 (Mich. 1980); *Calder* v. *City of Crystal,* 318 N.W.2d 838 (Minn. 1982); *Anderson* v. *Fred Wagner & Roy Anderson, Jr., Inc.,* 402 So.2d 320 (Miss. 1981); *Reeves.* v. *Ille Electric Co.,* 551 P.2d 647 (Mont. 1976); *Rosenberg* v. *Town of North Bergen,* 293 A.2d 662 (N.J. 1972); *Howell* v. *Burk,* 568 P.2d 214 (N.M. 1977); *Lamb* v. *Wedgewood South Corp.,* 302 S.E.2d 868 (N.C. 1983); *Hartford Fire Insurance Co.* v. *Lawrence, Dykes, Goddenberger, Bower & Clancy,* ___ F.2d _____, nos. 82-3404; 82-3419 (6th Cir. July 31, 1984); *Freezer Storage, Inc.* v. *Armstrong Cork Co.,* 382 A.2d 715 (Pa. 1978); *McMacken* v. *South Dakota,* 320 N.W.2d 131 (S.D. 1982); *Harmon* v. *Angus R. Jessup Assoc.,* 619 S.W.2d 522 (Tenn. 1981); *Sowders* v. *M.W. Kellogg Co.,* 663 S.W.2d 644 (Tex. App. 1 Dist. 1983); *Good* v. *Christensen,* 527 P.2d 223 (Utah 1974); *Yakima Fruit & Cold Storage Co.* v. *Central Heating & Plumbing Co.,* 503 P.2d 108 (Wash. 1972).

UNCONSTITUTIONAL: Shibuya v. *Architects Hawaii Ltd.,* 647 P.2d 276 (Hawaii 1982); *Skinner* v. *Anderson,* 231 N.E.2d 588 (Ill. 1967); *Pacific Indemnity Co.* v. *Thompson-Yeager, Inc.,* 260 N.W. 2d 548 (Minn. 1977); *State Farm Fire and Casualty Co.* v. *All Electric, Inc.,* 660 P.2d 995 (Nev. 1983); *Henderson Clay Products, Inc.* v. *Edgar Wood & Assoc.,* 451 A.2d 174 (N.H. 1982); *Loyal Order of Moose, Lodge 1785* v. *Cavaness,* 563 P.2d 143 (Okla. 1977); *Broome* v. *Truluck,* 241 S.E.2d 739 (S.C. 1978); *Kallas Millwork Corp.* v. *Square D Co.,* 225 N.W.2d 454 (Wis. 1975); *Phillips ABC Builders, Inc.,* 611 P.2d 821 (Wyo. 1980).

challenge on equal protection grounds to this type of statute. If nothing else, the large number of cases illustrates the magnitude of the problem.

Many of these cases from foreign jurisdictions uphold the constitutionality of this legislation against the challenge on equal protection grounds, but turn on the language of the particular state constitution involved. A lesser number of cases, but a growing number, hold to the contrary. In general, the cases holding the statute unconstitutional have followed the reasoning of the first case to do so, *Skinner* v. *Anderson,* 231 N.E.2d 588 (Ill. 1967):

> [T]he statute singles out the architect and the contractor, and grants them immunity. It is not at all inconceivable that the owner or person in control of such an improvement might be held liable for damage or injury that results from a defective condition for which the architect or contractor is in fact [primarily] responsible. . . . the statute takes away [the owner's] action for indemnity against the architect or contractor.
>
> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed the cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnished materials used in

> constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that one event is more likely than the other to occur . . . ." 231 N.E.2d at 591.

Defendants claim that insofar as the challenge to constitutionality under the equal protection clause of the Fourteenth Amendment to the United States Constitution, the United States Supreme Court's denial of certiorari in *Carter* v. *Hartenstein,* 455 S.W.2d 918 (Ark. 1970), appeal dismissed, 401 U.S. 901 (1971), is decisive. However, dismissal for lack of a substantial federal question is a summary disposition and not conclusive precedent, to be accorded "appropriate, but not necessarily conclusive, weight." *Mandel* v. *Bradley,* 432 U.S. 173, 180, 53 L.Ed.2d 199, 97 S.Ct. 2238 (1977).

Before considering the federal constitutional challenge, a threshold question is whether the statute is unconstitutional under a different and narrower provision of the Kentucky constitution. *See Fannin* v. *Williams,* Ky., 655 S.W.2d 480 (1983). We have decided that KRS 413.135 violates Section 59(5) of the Kentucky Constitution, which is more detailed and specific than the equal protection clause of the Federal Constitution. We declare the statute unconstitutional on state grounds, and do not reach the federal question.

The Kentucky Constitution, Section 59, is entitled "Local and special legislation." It provides:

"The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

. . . .

Fifth: To regulate the limitation of civil or criminal causes."

When considered against its historical background, it is evident that Section 59 is more than simply another way of restating the generalized language of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Indeed, Sections 1, 2 and 3 of the Kentucky Constitution which provide that the General Assembly is denied arbitrary power and shall treat all persons equally, suffice to embrace the equal protection clause of the Fourteenth Amendment.

But the debates of the Kentucky Constitutional Convention of 1890 and its detailed list particularizing twenty-nine different subjects where the "General Assembly shall not pass local or special acts" provide convincing evidence of the reasons for Section 59, prohibiting local and special legislation. *See* Debates, Constitutional Convention of 1890, 4 Vol.

The history of the times and the nature of the problem becomes clear when one reads the debates. Unbridled legislative power had become the captive of special interest groups. Concern for limiting the powers of the legislature in general, and with cutting off special

and local legislation in particular, was the primary motivating force behind enactment of the new Kentucky Constitution of 1891.

Limitations of time and space prevent restating the proceedings in detail. A few excerpts will suffice:

Delegate Mackoy:

> ". . . now, if there is any one evil more than another which the people of this State have earnestly demanded should be corrected by this Convention, it was that local and special legislation should be rooted up entirely . . . ." Vol. 3, p. 4019.

Delegate Young:

> "no special provisions for anybody, no exemptions, but all to have the same protection and all live under the same law, and no special benefits to anybody . . . ." Vol. 3, p. 3996-97.

Delegate Knox:

> ". . . look at the ponderous volumes of private acts passed our Legislature within the last few years, and enumerate the horde of railroad and other corporations which have been exempted from taxation, and allowed a variety of other special privileges, while battening like vampires upon the substance of the people. . . ." Vol. 1, p. 466.

Delegate Carroll:

> ". . . except for the vicious legislation and the local and special laws of all kinds and character passed by the Legislatures that have met in Kentucky for the last twenty years, that no proposition to call a Constitutional Convention could ever have received a majority of the votes of the people of Kentucky." Vol. 1, p. 1482.

City of Louisville v. *Kuntz,* 104 Ky. 584, 47 S.W. 592 (1898) followed with the new constitution fresh in mind. Our Court struck down as special legislation an act of the General Assembly providing a shorter statute of limitations for cities than existed for other claims for personal injury or property damage. The Court stated:

> "Section 59 of the Constitution expressly prohibits the legislature from passing a local or special act relating to limitation, and this case clearly illustrates the wisdom of the provision."

Attempted justification for a special protected classification for cities in 1898 would be more easily understood than the attempt to justify a special classification for architects, engineers and builders in 1965. Nevertheless, such special classification could not withstand constitutional challenge.

Other cases invalidating special statutes of limitations under Section 59(5) of the Kentucky Constitution

include *Commonwealth* v. *McCoun,* Ky., 313 S.W.2d 585 (1958); *City of Louisville* v. *Louisville Taxicab & Transfer Co.,* Ky., 238 S.W.2d 121 (1951); and *Gorley* v. *City of Louisville,* Ky., 47 S.W. 263 (1898).

In *City of Louisville* v. *Klusmeyer,* Ky., 324 S.W.2d 831 (1959), our Court struck down a statute seeking to protect city government by imposing primary liability upon the abutting property owner for injuries caused by defects in the sidewalk in cities of the first-class. Although our Constitution permits special legislation made local to a particular class of city where it pertains to organization and government, it prohibits other legislation made applicable to a single class "not based upon a natural, real or substantial distinction inhering in the subject matter." 324 S.W.2d at 834.

In contrast to the extensive history of our present constitution, the absence of any legislative history for KRS 413.135 is equally revealing. We know who initiated and lobbied for the legislation, but we know of no committee meetings or legislative debate discussing its purpose. The only legislative "history," as such, for KRS 413.135, is that contained in the title to the act:

> "An Act relating to the Statutes of Limitations governing the bringing of certain types of actions for wrongful death, personal injuries or damage to real or personal property, and creating a new section of Kentucky Revised Statutes, Chapter 413." Ky.Acts Ch. 246 (1966).

This title serves more to conceal than to reveal the nature of the act. It is an act which denies the right to sue for any cause (not just "wrongful death, personal injuries or damage to . . . property") five years following the substantial completion of construction. It does not function as a statute of limitations, but only to cut off claims which have not accrued within that period. It specifically provides that it does not supplant or extend existing limitations of actions pertaining to the same subject matter, such as one year after the cause of action accrues for personal injury or wrongful death (KRS 413.140) and five years after the cause of action accrues for property damage (KRS 413.120). Instead, KRS 413.135 functions as a one-way ticket to "Topsy-Turvy Land," a place described by Judge Jerome Frank in *Dincher* v. *Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952), where you "die before you are conceived, or be divorced before every you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad."

The argument is that the act is called a "statute of limitations" but its purpose is not to limit the time in which to bring causes of action which have accrued but to extinguish causes of action which have not yet accrued, and that, whereas the title to the act is generalized, the contents of the act refer to a narrowly defined and exclusively protected class. The Alabama Supreme Court has invalidated a similar architects and builders immunity statute under that state's counterpart to Section 51 of the Kentucky Constitution. We

need not decide the constitutional challenge presented by Section 51, since we have decided this case under Section 59(5). However, the arguably deceptive nature of the title of this act re-enforces the perception that it was enacted in response to a lobbying effort rather than because of reasonable, natural and justifiable distinctions between the protected group and others.

The fundamental question is whether the General Assembly had a reasonable basis for this legislation sufficient to justify creating a separate classification for certain persons engaged in the construction of improvements to real property, granting these persons a special immunity. cf. *Miles* v. *Shauntee,* Ky., 664 S.W.2d 512 (1984); *Board of Education of Jefferson County* v. *Board of Education of Louisville,* Ky., 472 S.W.2d 496 (1971). The South Carolina court stated in *Broome* v. *Truluck,* 241 S.E.2d 739 (S.C. 1978):

> "While it is broadly stated that a vital distinction exists between architects, engineers and contractors on the one hand and owners and manufacturers on the other, such vital distinction is no where pointed out such as to justify granting immunity to one group and not to the other." *Id* at 740.

A number of different reasons have been suggested by the defendants and those filing amicus curiae briefs on their behalf for creating a separate classification for these groups. But these are offered only as possible reasons that could have existed, not as reasons that did in fact exist. The justifications offered are largely

self-contradictory. For instance, one brief argues that the justification for the statute is to prevent the protected class from being inundated by law suits; another that ninety percent or more the cases of this type involved damages or injuries occurring within five years of construction and the statute addresses very few stale claims that present a disproportionate and excessive burden on the building industry.

One brief argues that it is reasonable to protect architects and builders and not product manufacturers and suppliers because product manufacturers and suppliers can utilize factory control and pretesting procedures and thus control their negligence in a way not available to architects and builders; another that the public does not need the same protection from architects and builders that it needs from product manufacturers and suppliers, because architects and builders have inspectors constantly looking over their shoulders and because no building can be occupied until after it has been thoroughly inspected.

The same evidentiary difficulties that confront builders and architects confront every litigant involved in an injury arising from the construction of an improvement to real property. As stated in *Overland Construction Co.* v. *Sirmons,* 369 So.2d 572 (Fla. 1979):

> "Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence . . . .The impact of these problems, however,

> is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintifs, who must generally carry the initial burden of establishing that the defendant was negligent." *Id.* at 574.

One defendant conceded that the justifications offered were self-contradictory, but argued that their contradictory nature was immaterial so long as one or the other of the reasons is not irrational. The creative abilities of lawyers suggesting possible reasons after the fact does not suffice to provide the kind of justification that is required for special legislation to be valid under Section 59 of the Kentucky Constitution.

Defense counsels' arguments throughout have been to the effect that any reason however imaginative that *could* have existed requires us to uphold otherwise discriminatory legislation. On the contrary, there must be a substantial and justifiable reason apparent from legislative history, from the statute's title, preamble or subject matter, or from some other authoritative source.

One of the principal arguments offered in support of special protection for architects and builders as contrasted with product manufacturers and suppliers is the supposed distinction between providing goods and services. To explore this argument requires some brief historical reflection.

There has never been any distinction under a negligence theory of liability between the treatment of

goods and services. Following a landmark English case decided in 1842, *Winterbottom* v. *Wright,* 10 M. & W. 109, 152 Eng.Rep. 402 (1842), which *in fact* "held only that the obligation of a contract could give no right of action to one who was not a contracting party (Prosser, *Law of Torts,* 4th Ed. 1971)," American courts erroneously applied to tort cases the contract doctrine of privity. They held that there must be a contractual relationship between the parties as a prerequisite to tort liability. This error was exposed and corrected for negligence cases by Justice Benjamin Cordozo in the landmark case of *MacPherson* v. *Buick Motor Co.,* 111 N.E.2d 1050 (N.Y. 1916). Following the demise of the erroneous defense of privity in negligence cases, there was a growing number of suits against architects and builders based on defects in construction. *See* Smith, *Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers, and Builders, supra.* It was this growing number of suits, not any distinction in negligence law between goods and services, that caused certain professional groups to lobby for special legislation. For similar reasons the railroads and others had sought and obtained special privileges from the General Assembly during the 1880's and thus precipitated a constitutional convention.

Nothing in this set of circumstances provided a constitutionally acceptable reason to discriminate between goods and services. In *In Re Beverly Hills Fire Litigation,* Ky., 672 S.W.2d 922 (1984), we pointed out

that this statute excluded materialmen for no well considered "reason," but because they were not "among the pressure groups initiating the legislation." 672 S.W.2d at 925. Landowners are similarly excluded from this protection. Thus, whatever the statutory objective, it was achieved by this statute in a discriminatory fashion. The express purpose of Section 59(5) of the Constitution is to prevent those who have sufficient political power or who can afford a persuasive lobbyist from achieving immunity from accountability to the law that governs others. *See Phillips* v. *ABC Builders,* 611 P.2d 821 (Wyo. 1980), invalidating an architects and builders immunity statute under a constitutional provision substantially identical to our Kentucky Constitution Section 59(5).

In the last twenty years an *additional* theory of liability labeled "strict liability in tort" has developed against products manufacturers and suppliers who fall within the class described in Section 402A of the *Restatement (Second) Torts.* But there has never been any distinction under a negligence theory between the treatment of goods and services.

Tort Law in America, An Intellectual History, by Prof. G. Edward White of the University of Virginia Law School, traces the growth and development of tort law from the common law writ system to the negligence theory during the last half of the last century and the early part of this one. The treatment of the concept of

negligence as expressing a universal duty is a hundred years old.

> "The growth of negligence from the omission of a preexisting, specific duty owed to a limited class of persons to the violation of a generalized standard of care owed to all ensured the emergence of Torts as an independent branch of law." G.E. White, *Tort Law in America, An Intellectual History,* 18 (1980).

The concept of negligence preexisted the Kentucky Constitution. The question debated in *Saylor* v. *Hall, supra,* and *Carney* v. *Moody, supra,* was whether the privity requirement was part of the negligence concept in the period before the 1891 Constitution. A 1905 case, *Simons* v. *Gregory,* 120 Ky. 116, 85 S.W. 751 (1905), is cited for the proposition that it was. However, this reads more into *Simons* v. *Gregory* than the language of the opinion provides. *Carney* v. *Moody* reached an opposite result from *Saylor* v. *Hall* while conceding there was no "factual distinction" and without overruling it.

We need not write Chapter Three to *Saylor* v. *Hall* and *Carney* v. *Moody*. The inquiry has shifted from whether the statute is arbitrary and discriminatory, to constitutional issues not discussed in those opinions, equal protection and special legislation. With this the issue, constitutionality does not turn on deciphering the status of the cause of action "prior to the adoption of the Constitution (*Carney* v. *Moody, supra,* 646

S.W.2d at 41)," but on whether the General Assembly had a rational justification for creating a special class and conferring special privileges and immunity on that class at the time the statute in question was enacted. No substantial reason has been presented to us.

The only apparent basis for the present legislation is that a special class, builders, architects and engineers involved in construction, faced with a growing exposure to litigation, lobbied for a statute limiting their liability. There is no social or economic basis presented to justify a special class, only their own self-interest. Other groups similarly situated do not share in their legislative windfall. Their subjective reasons will not withstand public policy analysis.

The general public is exposed to injury, death and property damage from the collapse of a building. As in the recent catastrophe involving the collapse of the overhead walkway in the Hyatt Regency Hotel in Kansas City, many people from all walks of life may be injured in one catastrophe caused by faulty construction. The protection of the general public is sacrificed to the interest of a special group. This is the essence of the constitutional evil addressed by Section 59, the prohibition against local and special legislation.

Where to draw the line as to what constitutes a "reasonable basis" for otherwise discriminatory legislation is a difficult matter. We do not do so here beyond stating that imaginative reasons that *could* exist,

without anything of a positive nature to suggest that they *did* exist, do not suffice.

In Re Beverly Hills Fire Litigation, supra, held that KRS 413.135 had no application to the manufacturers of aluminum wire used in the electrical circuits in the Beverly Hills Supper Club. We concluded that the statute was not intended to cover products manufacturers, suppliers and materialmen, based on the express language of the statute, the history of its development, and the constitutionally impermissible arbitrariness of attempting a distinction between products utilized as component parts in a building and the same other products not so utilized. One of the principal arguments between the parties in the present case is whether or not certain of the defendants should be classified as products manufacturers and suppliers, not including within the terms of KRS 413.135. Both sides rely on the *Beverly Hills Fire Litigation* case in support of their arguments.

In *Tabler* v. *Wallace,* one of the principal defendants is Dover Elevator Co. which, through its predecessor, manufactured and supplied the elevator and also assisted in the design and construction of the portion of the building which housed it. If there is liability it is based upon a combination of the elevator which is a product, and the shaft which is not, and Dover Elevator Co. had a hand in both items.

In *General Electric Co.* v. *Nucor,* General Electric makes a plausible argument that the gravamen of the action is not the design or construction of the roof, or even the trusses, but an admitted error in what is a standardized process for manufacturing girders which are essentially uniform in nature. So viewed, Nucor is a products manufacturer and Harman & Conway, Inc. is a products supplier.

We need not attempt to unravel the dilemma which occurs in both of these cases in attempting a rational distinction between the role of products manufacturers or suppliers on the one hand, and design and construction on the other. It suffices that the argument highlights the arbitrariness of providing an immunity to those engaged in design and construction of a real estate improvement which does not extend to others similarly situated. It was this type of arbitrariness that Kentucky Constitution Section 59 in general, and Subsection 5 in particular, was designed to prevent.

The continuing viability of Section 59 of the Kentucky Constitution has been recently expounded in *Miles* v. *Shauntee, supra,* and in *Board of Education of Jefferson County* v. *Board of Education of Louisville, supra. Commonwealth* v. *O'Harrah,* 262 S.W.2d 385, 389 (1953) states our duty to support both the "letter and spirit" of the Constitution. We "may not countenance an evasion or even an unintentional avoidance of our fundamental law." *Id.* KRS 413.135

is in fundamental conflict with Kentucky Constitution Section 59(5) and its historical development.

The decision of the Court of Appeals in *Tabler* v. *Wallace* is affirmed. The decision of the trial court in *General Electric* v. *Nucor* is reversed. Both cases are remanded to the trial courts for further proceedings consistent with this opinion.

Stephens, C.J., Aker, Gant, and Leibson, JJ., concur in both cases. Vance, J., concurs in *General Electric* v. *Nucor,* but dissents in *Tabler* v. *Wallace.* Stephenson, J., dissents in both cases by separate dissenting opinion. Wintersheimer, J., dissents in both cases.

ATTORNEYS FOR MOVANT, TABLER:

W. T. Adkins
Ronald L. Green
444 W. Second Street
Lexington, KY 40508

ATTORNEYS FOR MOVANT, DOVER ELEV.:

Robert H. Measle
Suite 4-A
Citizens Bank Square
Lexington, KY 40507

ATTORNEY FOR RESPONDENTS,
MARY L. WALLACE, ET AL.:

Peter Perlman
388 S. Broadway
Lexington, KY 40508

ATTORNEY FOR AMICUS CURIAE,
PRC Engineering, Inc.:

Laurence J. Zielke
A. Neal Herrington
Frank G. Simpson III
1705 Meidinger Tower
Louisville, KY 40202

ATTORNEY FOR AMICUS CURIAE,
KY. HOME BUILDERS ASSN.:

W. Terry McBrayer
Jo Ann Alexander
400 American Bank Bldg.
Short & Upper Streets
Lexington, KY 40507

ATTORNEYS FOR APPELLANTS,
GENERAL ELECTRIC, ET AL.:

Sheryl G. Snyder
Francis J. Mellen, Jr.
Virginia H. Snell
Citizens Plaza
Louisville, KY 40202

ATTORNEYS FOR APPELLEES,
NUCOR CORP.:

Winfrey P. Blackburn, Jr.
W. Kennedy Simpson
600 W. Main Street
Louisville, KY 40202

William A. Miller, Sr.
725 Marion E. Taylor Bldg.
Louisville, KY 40202

ATTORNEYS FOR APPELLEES,
HARMAN & COMPANY, JACOB HARMAN,
AND POLK COMPANY:

Ronald V. Simpson
2800 First National Tower
Louisville, KY 40202

ATTORNEYS FOR APPELLEE,
GARST-RECEVEUR:

Victor W. Ewen
Campbell Ewen
650 Starks Bldg.
Louisville, KY 40202

RENDERED: November 21, 1985
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
84-SC-844-DG
85-SC-63-TRG

WILLIAM B. TABLER, ARCHITECT
and DOVER ELEVATOR COMPANY MOVANTS

ON REVIEW FROM COURT OF APPEALS

V. #83-CA-2160-MR
(Fayette Circuit Court #81-CI-1066)

MARY L. WALLACE, ADMINISTRATRIX
OF THE ESTATE OF WILLIAM WALLACE,
and MARY L. WALLACE,
INDIVIDUALLY RESPONDENTS

AND

GENERAL ELECTRIC COMPANY,
ARKWRIGHT-BOSTON MANUFACTURERS,
MUTUAL INSURANCE COMPANY, AND
INDUSTRIAL RISK INSURERS APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT

V. HON. BENJAMIN F. SHOBE, JUDGE
NO. 79-CI-01275

NUCOR CORPORATION,
HARMAN & CONWAY, INC.,
JACOB A. HARMAN, POLK &
CONWAY, AND GARST-RECEVEUR
CONSTRUCTION COMPANY, INC. APPELLEES

DISSENTING OPINION BY JUSTICE STEPHENSON

From a reading of the majority opinion, as it applies to *Tabler* v. *Wallace,* I conclude that this is an opinion of great significance to bench and bar. The significance that I attach to the opinion is not in what it says, but in what it does not say.

The issue upon which this case was decided by the Court of Appeals and this court was not presented to the trial court; thus, it was not preserved for appellate review. In reversing the trial court, the Court of Appeals carefully avoided saying that the trial court was in error. Instead, in an obscure footnote, the Court of Appeals refers to arguments about non-preservation, etc., and concludes the arguments are not persuasive. This elevates judicial obfuscation to new heights. The record is clear that the issue was not presented to the trial court. Wallace does not argue otherwise. Apparently, considering that an obscure footnote is a proper judicial burial place for a well established rule of law, the majority opinion, by footnote, observes that the Court of Appeals ruled adversely to the claim that the constitutional issue was not preserved; then; like Pontius Pilate, the majority washes its hands of the issue by saying we express no opinion on the preservation.

I daresay the reader of the majority opinion would discern through the judicial fog that there was some issue about preservation in the Court of Appeals, and it was not worthy of further comment.

Towards the end of the majority opinion, it is stated: "We may not countenance an evasion or even an unintentional avoidance of our fundamental law." This is a lofty sentiment about the constitution and should apply equally to a rule of law of preservation of issues for appellate review.

This noble sentiment will be small comfort to those members of the bar who have lost in this court and the Court of Appeals for the reason that an issue was not preserved.

The language "not preserved for appellate review" is to be found in a multitude of opinions but, apparently now and in the future, we will be treated to a selective system of application of the rule. When it feels good, the rule can be ignored in an obscure footnote.

In this court, the lawyer for Wallace makes the strange argument that somehow this issue could not be presented to the trial court until after judgment (the issue was not presented after judgment either). In *General Electric* v. *Nucor,* the issue was presented to the trial court, thus preserving it.

Manifest injustice is also argued, but not why we should invoke this principle. Presumably, Wallace will feel distressed, but this is not enough. Wallace's lawyer should have raised the issue if he wanted us to consider it.

In matters of this importance, the reasons for not following the rule on preservation should spelled out so that the bar will have some indication of the circumstances in which this rule will be applied in the future. The trial court had no opportunity to rule on the issue. The judgment of the trial court should be affirmed and the Court of Appeals reversed.

Accordingly, I dissent from the holding in *Tabler* v. *Wallace.*

Vance and Wintersheimer, JJ., join in this dissent.

I also dissent from the holding in *General Electric* v. *Nucor* for the reason that I do not believe KRS 413.135 violates Section 59 of the Kentucky Constitution.

Wintersheimer, J., joins in this dissent.

APPENDIX B

FILED	RECEIVED
DEC 30 1985	DEC 30 1985
John C. Scott	JOHN C. SCOTT
CLERK	CLERK
SUPREME COURT	COURT OF APPEALS

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 84-SC-844-D

WILLIAM B. TABLER, Architect
and DOVER ELEVATOR COMPANY PETITIONERS

V. **RESPONSE TO JOINT PETITION FOR REHEARING**

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE
and MARY L. WALLACE
Individually RESPONDENT

REVIEW OF APPEAL 83-CA-2160-MR
FROM FAYETTE CIRCUIT COURT

BRIEF FOR THE RESPONDENT
MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE, Individually

PETER PERLMAN
PETER PERLMAN LAW OFFICES, P.S.C.
388 SOUTH BROADWAY
LEXINGTON, KENTUCKY 40508
Telephone (606) 253-3919
ATTORNEYS FOR RESPONDENT,
MARY L. WALLACE, ADMINISTRATRIX
OF THE ESTATE OF WILLIAM
WALLACE, AND MARY L. WALLACE,
INDIVIDUALLY

This is to certify that pursuant to CR 76.12(5), copies of the within Brief for Respondent have been served upon Hon. W. T. Adkins, Hon. Ronald L. Green, Boehl, Stopher, Graves & Deindoerfer, 444 West Second Street, Lexington, Kentucky; Hon. Robert H. Measle, Fowler, Measle & Bell, Suite 4-A, Citizens Bank Square, Lexington, Kentucky 40507; Hon. John P. Hayes, Chief Judge, Hon. Boyce G. Clayton, Judge, Hon. Harris S. Howard, Judge, Kentucky Court of Appeals, 403 Wapping Street, Frankfort, Kentucky 40601, and Hon. James E. Keller, Judge, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky 40507, this the 30th day of December, 1985.

/s/ Peter Perlman
ATTORNEY FOR RESPONDENT

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF BRIEF 1

KRS 413.135 ..... 1, 2, 3, 4

ARGUMENT I

THE ISSUE LITIGATED AT THE CIRCUIT COURT WAS THE RETROACTIVITY OF *CARNEY* V. *MOODY*. 2

Saylor v. *Hall*,
Ky., 497 S.W.2d 218 (1973) 2, 3

Carney v. *Moody*,
Ky., 646 S.W.2d 40 (1983) 2, 3

ARGUMENT II

THE CONSTITUTIONALITY OF KRS 413.135 WAS RAISED AND PRESERVED BY OBJECTION AT THE TRIAL COURT LEVEL. . 3

ARGUMENT III

TO DISMISS THE RESPONDENT'S CAUSE OF ACTION WOULD REPRESENT MANIFEST INJUSTICE. 4

Pittsburgh and Midway Mining Co. v. *Rushing*,
Ky., 456 S.W.2d 816, 818 (1969) 4

ARGUMENT IV

ANY FAILURE TO NOTIFY THE ATTORNEY GENERAL WAS CURED BY HIS DECISION NOT TO INTERVENE. 5

CONCLUSION 5

PURPOSE OF BRIEF

The Supreme Court of Kentucky, by its Opinion rendered on November 21, 1985, affirmed the decision of the Court of Appeals holding KRS 413.135 unconstitutional. The opinion remanded the case of *Tabler* v. *Wallace* (file No. 84-SC-844-DG) to the trial court for proceedings consistent with the opinion. Petitioners William B. Tabler and Dover Elevator Company have filed a Joint Petition for Rehearing. This Brief is submitted in response to the Petitioners' Joint Petition.

KRS 413.135 was relied upon by the Petitioners in obtaining summary judgment in defense of the wrongful death action brought by Respondent Mary Wallace. The Petition for Rehearing does not focus upon the Supreme Court's invalidation of the statute of repose. Rather, Petitioners' argument is based upon two alleged procedural errors on the part of the Respondent: (1) the failure to raise a constitutional attack on KRS 413.135 at the Circuit Court level; and (2) the failure to timely notify the Attorney General of the intention to attack the constitutionality of KRS 413.135.

Neither of the above arguments represent a new issue in these proceedings. Both claims have been previously raised and disposed of by the Court of Appeals and the Kentucky Supreme Court. The Kentucky Supreme Court has recognized the constitutionality of KRS 413.135 to be an issue of extreme magnitude and worthy of its attention. In fact, this issue was considered so significant that the Supreme Court accepted

transfer of the companion case, *General Electric* v. *Nucor,* (85-SC-63-TRG) by waiving the jurisdiction and necessary proceedings in the Court of Appeals.

Petitioners seek a dismissal of Mrs. Wallace's cause of action. Besides being manifestly unjust, such a result would make no sense from a jurisprudential point of view. It would apply the workings of the unconstitutional statute upon Mrs. Wallace, at whose time, energy and expense the constitutional issue was brought before the Court.

ARGUMENT

I. THE ISSUE LITIGATED AT THE CIRCUIT COURT WAS THE RETROACTIVITY OF *CARNEY* V. *MOODY.*

Since its passage in 1966 by the General Assembly, the constitutional status of KRS 413.135 has changed three times. In 1973, the Kentucky Supreme Court held the statute to be an unconstitutional bar to actions involving improvements to real estate completed prior to the passage of the statute. *Saylor* v. *Hall,* Ky., 497 S.W.2d 218 (1973). In 1983, under *Carney* v. *Moody,* Ky., 646 S.W.2d 40, the Court overruled *Saylor* and held the statute to be constitutional. The Majority's Opinion of November 21, 1985 again held KRS 413.135 to be unconstitutional.

Respondent Mary Wallace's wrongful death action was filed on January 19, 1981. The issue litigated at the trial court was the retroactivity of the *Carney*

decision, and thus whether the statute was applicable to the case at bar. The Circuit Court's Opinion of June 22, 1983 regarding the Petitioners' *Motion for Summary Judgment* recognized this, stating as follows:

> [T]he dispositive issue of law is whether the Supreme Court of Kentucky's decision in *Carney, et al.* v. *Moody, et al.* Ky., 646 S.W.2d 40 (1983) shall be applied retroactively in this case.

(A copy of the Circuit Court's Opinion is attached as Appendix A.)

Availability of a statute does not give rise to the issue of classes created by operation of the statute. The equal protection issues became ripe for decision only upon entry of Summary Judgment, when the discriminatory classifications of the statute became real and apparent.

II. THE CONSTITUTIONALITY OF KRS 413.135 WAS RAISED AND PRESERVED BY OBJECTION AT THE TRIAL COURT LEVEL.

Respondent objected to the application of KRS 413.135 to the case at bar before the entry of judgment by the Circuit Court. Respondent submitted the following in her *Reply Memorandum* in objection to the Petitioners' *Motion for Leave to Amend Answer:*

> At the time the injuries to William Wallace occurred, in January, 1980, the holding in *Saylor* v. *Hall* was effective and KRS 413.135 had no force and effect of law. . . . . For that reason defense asserted by the Defendants in their Amended Answer is one that is not a valid one under the facts of this case. (Respondent's *Reply Memorandum,* page 2, January 28, 1983).

After the Petitioners were allowed to amend their Answer, Respondent renewed her objection. Again the objection was the authority applicable to the Respondent's case. In other words, the constitutionality of KRS 413.135 was raised when the Respondent cited *Saylor* v. *Hall* as the appropriate authority.

III. TO DISMISS THE RESPONDENT'S CAUSE OF ACTION WOULD REPRESENT MANIFEST INJUSTICE.

As recognized by the Petitioners in their Petition for Rehearing, Kentucky law allows an exception that permits appellate review in situations to the case at bar:

> The rule is firmly established that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to *avert manifest injustice* that this court will entertain an argument not first presented to the trial court. [emphasis added.]

Pittsburgh and Midway Coal Mining Co. v. *Rushing*, Ky., 456 S.W.2d 816, 818 (1969).

Respondent Mary Wallace's action is for the wrongful death of her husband, William Wallace. Mr. Wallace was killed while attempting to service an elevator designed and manufactured by the Petitioner, Dover Elevator Company. The elevator shaft in question was designed by Petitioner William B. Tabler, an architect. The action is based upon a claim of defective design, construction and negligent use of the elevator and the elevator shaft.

Respondent Mary Wallace initiated her wrongful death action over four years ago. Her cause of action has encountered proceedings in three courts, but has never been tried on the merits. It was through her perseverance that the issue of the constitutionality of KRS 413.135 was brought before the court. To dismiss her cause of action and deny her a trial on the merits at this juncture would represent manifest injustice.

Respondent fails to see how the Petitioners would be prejudiced by simply having to defend the case on the merits without the shield of a statute that has been declared unconstitutional. It should be noted that the Petitioners saw no problem in evoking the requirements and necessity of justice when they sought to amend their answers with an affirmative defense two years after the original filing.

IV. ANY FAILURE TO NOTIFY THE ATTORNEY GENERAL WAS CURED BY HIS DECISION NOT TO INTERVENE.

The Attorney General notified all interested parties of his intent not to intervene on October 25, 1983. (Appendix B) This renders the argument of the Petitioners moot and without merit. Again, there has been no showing that the Petitioners have been prejudiced in any way.

CONCLUSION

Petitoners' Joint Petition for Rehearing raises claims which have been previously addressed and disposed of by the Court of Appeals and the Kentucky Supreme Court. It is within the public interest and clearly within the province of this Court to analyze discriminatory classifications under the equal protection clause of the Kentucky Constitution at any time the issue arises. The dismissal of Mary Wallace's claim would apply the unconstitutional statute against her. Such a result would be manifestly unjust.

For the foregoing reasons, Respondent requests that the Petitioners' Joint Petition for Rehearing be dismissed.

Respectfully submitted,

PETER PERLMAN LAW OFFICES, P.S.C.
388 SOUTH BROADWAY
LEXINGTON, KENTUCKY 40508
BY: /s/ Peter Perlman
PETER PERLMAN
ATTORNEY FOR RESPONDENT

* * * * * * *

APPENDIX C

Supreme Court of Kentucky

84-SC844-DG
85-SC-63-TRG

WILLIAM B. TABLER, ARCHITECT
AND DOVER ELEVATOR
COMPANY — MOVANTS

ON REVIEW FROM COURT OF APPEALS
83-CA-2160-MR
(Fayette Circuit Court No. 81-CI-0166)

MARY L. WALLACE, ADMINISTRATRIX
OF THE ESTATE OF WILLIAM WALLACE
AND MARY L. WALLACE,
INDIVIDUALLY — RESPONDENTS

AND

GENERAL ELECTRIC COMPANY
ARKWRIGHT-BOSTON MANUFACTURERS
MUTUAL INSURANCE COMPANY, AND
INDUSTRIAL RISK INSURERS — APPELLANTS

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BENJAMIN F. SHOBE, JUDGE
No. 79-CI-01275

NUCOR CORPORATION, HARMAN &
CONWAY, NC., JACOB A HARMAN,
POLK CONWAY, AND GARST-RECEVEUR
CONSTRUCTION COMPANY, INC. APPELLEES

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing is denied. The dissenting opinion by Stephenson, J., is modified on its face by deleting Pages 3 and 4 by substituting in lieu thereof new Pages 3, 4, and 5, attached as an appendix to this order.

ENTERED February 27, 1986.

/s/Robert F. Stephens
Chief Justice

about the constitution and should apply equally to a rule of law on preservation of issues for appellate review.

This noble sentiment will be small comfort to those members of the bar who have lost in this court and the Court of Appeals for the reason that an issue was not preserved.

The language "not preserved for appellate review" is to be found in a multitude of opinions but, appearently now and in the future, we will be treated to a selective system of application of the rule. When it feels good, the rule can be ignored in an obscure footnote.

In this court, the lawyer for Wallace makes the strange argument that somehow this issue could not be presented to the trial court until after judgment (the issue was not presented after judgment either). In General Electric v. Nucor, the issue was presented to the trial court, thus preserving it.

Manifest injustice is also argued, but not why we should invoke this principle. Presumably, Wallace will feel distressed, but this is not enough. Wallace's lawyer should have raised the issue if he wanted us to consider it.

Another facet of the nonpreservation issue is the deliberate flaunting of a legislative mandate. Having more than a passing interest in maintaining the validity of legislative enactments, the Legislature enacted KRS 418.075, the relevant portion of which provides:

> . . .In any proceeding which involves the validity of a statute, the attorney general of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the attorney general of

> the state shall also be served with a copy of the petition and be entitled to be heard.

Thus, the Legislature has dictated that the Attorney General shall have a right to be heard *before judgment* when there is an attack upon the constitutionality of a statute. This seems reasonable to me, and this court has consistently required compliance with the statute, *Revis* v.*Daugherty,* 215 Ky. 823, 287 S.W. 28 (1926); *Jefferson Fiscal Court* v. *Trager,* 300 Ky. 606, 189 S.W.2d 955 (1945); and *Dewey* v. *Allinder,* Ky., 469 S.W.2d 548 (1971).

Also, this court decided that the proposition was important enough to be incorporated into our Rules. Thus, CR 24.03 provides in relevant part:

> . . .When the constitutionality of an act of the General Assembly affecting the public interest is drawn in question in any action to which the State or an officer, agency, or employee thereof is not a party, the movant shall serve notice of the motion upon the Attorney-General.

There is no pretense in *Tabler* that there was compliance with either statute or rule. The Attorney General was notified after judgment and after the notice of appeal to the Court of Appeals was filed. Understandably, he declined to intervene. No doubt he made the quaint assumption that the Court of Appeals would follow the statute, the cases based thereon, and our rules. For some strange reason, the Court of Appeals was not persuaded that the matter

was unpreserved. The majority opinion does not even consider this proposition worthy of a footnote. Undoubtedly, this passing over of a failure to follow the statute or the rule in the trial court is due to the fact that there cannot be any reasonable explanation why the proposition can be considered by this court. If the majority believes we should be perfectly flexible and choosey in preservation of arguments, it should so state. The record is there for anyone to see.

In matters of this importance, the reasons for not following the rule on preservation should be spelled out so that the bar will have some indication of the circumstances in which this rule will be applied in the future. The trial court had no opportunity to rule on the issue. The judgment of the trial court should be affirmed and the Court of Appeals reversed.

Accordingly, I dissent from the holding in *Tabler* v. *Wallace.*

Vance and Wintersheimer, JJ., join in this dissent.

I also dissent from the holding in *General Electric* v. *Nucor* for the reason that I do not believe KRS 413.135 violates Section 59 of the Kentucky Constitution.

Architects, builders, etc., comprise a large enough class with particular problems to take it out of the "special legislation" category.

Wintersheimer, J., joins in this dissent.

APPENDIX D

OPINION RENDERED:
TO BE PUBLISHED
September 7, 1984; 10:00 a.m.

Commonwealth of Kentucky

Court of Appeals

NO. 83-CA-2160-MR

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE,
Individually APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 81-CI-0166

WILLIAM TABLER, Architect,
and DOVER ELEVATOR COMPANY,
HARLEY HOTELS, INC., AND
RUSSELL HALCOMB APPELLEES

REVERSING AND REMANDING

BEFORE: HAYES, CHIEF JUDGE, CLAYTON and HOWARD, Judges. CLAYTON, JUDGE. Mary L.

Wallace, individually and as administratrix of the estate of William Wallace, appeals from a summary judgment of the Fayette Circuit Court dismissing her action for the wrongful death of her late husband, mortally injured while attempting to repair an elevator at the Harley Hotel in Lexington, Kentucky. By that judgment, the lower court gave retroactive effect to the recent Kentucky decision *Carney* v. *Moody*, Ky., 646 S.W.2d 40 (1983), to find that the action by Wallace against the designing architect, elevator company, and hotel was barred by the statute of repose found at KRS 413.135, commonly referred to as the "architect's no-action statute." According to the provisions of that statute,

> Actions for damages arising out of injury resulting from construction of improvements to real estate. - - (1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, inspection or construction of any such improvement after the expiration of five (5) years following, the substantial completion of such improvement.

The sole question we are presented with on appeal is whether KRS 413.135 violates the equal protection provisions of the Constitution of Kentucky and the Constitution of the United States.[1] Neither *Saylor* v. *Hall*, Ky., 497 S.W.2d 218 (1973), nor *Carney* v. *Moody, supra*, resolves this complex question. Both of those opinions analyze KRS 413.135 under Sections 14, 54, and 241 of the Kentucky Constitution prohibiting the abolition of legal remedies for wrongful death, personal injury, property damage or defamation. Thus, their legal analysis is clearly distinguishable. We are not, however, without guidance in this matter. Approximately twenty states have now considered the constitutionality of no-action statutes materially similar to our own. For decisions holding such statutes to be unconstitutional see *McClanahan* v. *American Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo., 1980); *Fujioka* v. *Kann*, 514 P.2d 568 (Hawaii 1973); *Skinner* v. *Anderson*, 231 N.E.2d 588 (Ill. 1967); *Pacific Indem. Co.* v. *Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977); *Loyal Order of the Moose Lodge 1785* v. *Cavaness*, 563 P.2d 143 (Okla. 1977); *Broome* v. *Truluck*, 241 S.E.2d 739 (S.C. 1978); *Kallas Millwork Corp.* v. *Square D. Co.*, 225 N.W.2d

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[1]The numerous arguments raised by the appellees concerning preservation of the constitutional issue, failure to notify the Attorney General, and standing of the appellant to sue have been reviewed and are considered to be nonpersuasive. They will not be further discussed in this opinion.

454 (Wis. 1975); *Phillips* v. *ABC Builders, Inc.*, 611 P.2d 821 (Who. 1980); *State Farm Fire and Casualty Co.* v. *All Electric, Inc.*, 660 P.2d 995 (Nev. 1953). For decisions holding such statutes to be constitutional see *Carter* v. *Hartenstein*, 455 S.W.2d 918 (Ark. 1970); *Burmaster* v. *Gravity Drainage District No. 2 of Parish of St. Charles*, 366 So.2d 1381 (La. 1978); *Bouser* v. *Lincoln Park*, 268 N.W.2d 332 (Mich. App. 1978); *Reeves* v. *Ille Electric Co.*, 551 P.2d 647 (Mont. 1976); *Rosenberg* v. *North Bergen*, 293 A.2d 662 (N.J. 1972); *Howell* v. *Burk, 568 P.2d 214 (N.M. App. 1977); Joseph* v. *Burns*, 491 P.2d 108 (Ore. 1971); *Hill* v. *Forrest & Cotton, Inc.*, 555 S.W.2d 145 (Tex. Civ. App. 1977); *Good* v. *Christenson*, 527 P.2d 223 (Utah 1974); *Yakima Fruit & Cold Storage Co.* v. *Central Heating & Plumbing Co.*, 503 P.2d 103 (Wash. 1972). While the no-action statutes involved in these decisions may vary from state to state in their language and the length of their time limitations, these variations are for the most part insignificant, "a distinguishing factor of no importance." *Phillips* v. *ABC Builders*, Inc., *supra*, at 825. The two exceptions to the material uniformity among the various statutes are found in the Oregon and Washington statutes which, unlike the Kentucky statute, do not enumerate a class, but instead declare all persons involved in construction of the improvement immune from suit after seven years. *Id. at 380.*

In essence, KRS 413.135 imposes a five year time limit upon actions against architects, engineers, or builders for injury or death arising from any deficiency in their "design, planning, supervision, inspection or construction of any improvement to real property." No legal action may be brought against these individuals more than five years after the substantial completion of the improvement. That their negligence may have been the sole proximate cause of property damage, personal injury, or death is immaterial. They may not be successfully sued in tort or in contract after the five year time period has run. In this sense, KRS 413.135 is a statute of repose and may be said to bar a cause of action before it exists, for persons injured six, seven, or any number of years greater than five years following substantial completion of the improvement forfeit their potential cause of action before it accrues, before they are injured. *See Kallas Millwork Corp.* v. *Square D. Co., supra,* at 457. In contrast, the traditional statute of limitations normally begins to run upon the plaintiff's discovery of his injury and is intended as a means of ensuring that plaintiffs diligently pursue their rights. Under KRS 413.135 discovery or even the existence of injury is unimportant and diligent prosecution of an untimely action is futile.

The origin of KRS 413.135 and other such statutes of repose can be found as the indirect result of the landmark decision *MacPherson* v. *Buick Motor*

Co., 111 N.E. 1050 (N.Y. 1916). Prior to *MacPherson, supra*, the doctrine of "privity of contract" established in the mid-1800's by *Winterbottom* v. *Wright*, 10 M. & W. 109 (Eng. 1842) denied third-party plaintiffs recovery against an architect or engineer responsible for design or construction of a defective structure once that structure had been completed and accepted by the owner *MacPherson, supra*, and its progeny, however, abolished the defense of "no privity of contract," thus exposing the presently involved professionals to potential interminable liability. *See Limitation of Action Statutes for Architects and Builders - -Blueprints for Non-Action*, 18 Cath. U.L. Rev. 361 (1969); *Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers and Builders*, 60 K.L.J. 462 (1971-72); Annot 93 A.L.R.3rd 1249 (1979). Their reaction to this expanded responsibility was to use their separate professional organizations to lobby for model legislation such as KRS 413.135. By 1969, over thirty states had adopted such statutes. *See Loyal Order of Moose Lodge 1785* v. *Cavaness, supra*, at 145. However, following the initial legislative surge to enact no-action statutes during the 1960's, they became increasingly subject to constitutional attack on three bases: (1) that they abrogate a common law right, (2) that they are special legislation, (3) that they violate the equal protection clause of the 14th Amendment to the United States Constitution. At present, we are concerned solely with the complexities of the equal

protection provisions of the Kentucky and United States Constitution.

Equal protection of the law is a constitutional guarantee which does not readily lend itself to patent formuli. Its parameters are instead, best developed on a case-by-case basis within the confines of facts giving rise to actual controversies. Numerous courts, however, have attempted to set forth a basic understanding of the standards involved. In *Fujioka* v. *Kann*, *supra*, an early decision declaring the architect's no-action statute of Hawaii unconstitutional, it is stated that " 'What is prohibited by the equal protection guaranty is class legislation, discriminating against some and favoring others:" *Id.* at 570 (citing *State* v. *Johnston*, 456 P.2d 805, 810 (Hawaii 1969).) *Fujioka* continues to add that " 'in exercising this right to classify in order to achieve social goals the legislature may not act arbitrarily; that is, the classification of a particular group as a subject for regulation must be reasonable in relation to the purpose of the legislation,' " *Id.* at 571 (citing *Hasegawa* v. *Maui Pineapple Co.*, 475 P.2d 679, 681 (Hawaii 1970)). The test to find a statute invalid under the equal protection clause has also been expressed in *Kallas Millwork Corporation* v. *Square D. Co.*, *supra*, a Wisconsin decision holding that state's no-action statute unconstitutional, as being "whether there exists any rational and reasonable justification for the classification." *Id.* at 458 (citing *State* v. *Duffy*, 194 N.W.2d 624 (Wisc. 1972)). *Kallas* continues to add

that "[o]nly if the classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will the classification be held violative of constitutional guarantees of equal protection." *Id.* (citing *Simanco, Inc.*, v. *Dep't of Revenue*, 203 N.W.2d 648, (Wisc. 1973)). Kentucky's highest appellate court, has described the guarantee thusly, "there must be a substantial reason why a particular law is made to operate upon a class of citizens and not generally upon all.'" *Walters* v. *Binder*, Ky., 435 S.W.2d 464, 466 (1968) (citing *Dawson* v. *Hamilton*, Ky., 314 S.W.2d 532 (1968)). Put otherwise, " 'For a law to be general in its constitutional sense it must meet the following requirements: (1) It must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification.'" *Id.* (citing *Schoo* v. *Rose*, Ky., 270 S.W.2d 940 (1954)). It is the second of the two criteria upon which we focus our attention. Specifically, we ask whether the classification created by KRS 413.135 is rational in fact. In layman's terms, are there any real differences to distinguish the favored class, architects, engineers, and builders, from other classes excluded from the statute's protection, in this case, persons in control of the real property and tenants (specifically excluded under subsection 4 of KRS 413.135) and materialmen (recently excluded from protection by the Kentucky Supreme Court Decision *In re: Beverly Hills Fire litigation*, Ky., S.W.2d_____, 31 K.L.S. 7 (May 31, 1984). After a thorough review of the cases on both

sides of the issue we conclude that there is no rational basis to exclude materialmen, and controlling owners and tenants from the immunity granted architects, engineers, and builders by KRS 413.135.

Of the many cases upholding statutes such as KRS 413.135, few vigorously analyze the reasons potentially supporting the class distinctions created. Most of these opinions seem content simply to recognize the general power of the legislature to classify while repeating general prescriptions for analyzing the guarantees of equal protection *See Kallas Millwork Corp.* v. *Square D. Co., supra,* at 460 (criticizing *Rosenberg* v. *Town of North Bergen, supra;* and *Yakima Fruit & Cold Storage Co.* v. *Central Heating & Plumbing Co., supra;* for their failure to come to grips with the real problem presented); *Pacific Indemnity Company* v. *Thompson-Yaeger, Inc., supra,* at 555 ("We have reviewed these cases carefully are are convinced that the better reasoned position is embodied in the decisions which hold such statutes to be unconstitutional. . . ."); *Phillips* v. *ABC Builders, Inc., supra,* at 830 (condemning *Carter* v. *Hartenstein, supra; Reeves* v. *Ille Electric Co., supra;* and *Burmaster* v. *Gravity Drainage District No. 2 of Parish of St. Charles, supra;* as being conclusory). Of the remaining cases more completely examing the issue, the most thorough constitutional defense of this type of statute is found in *Freezer Storage, Inc.* v. *Armstrong Cork Co.,* 341 A.2d 184 (Pa. Supr. Ct. 1975). In that decision, the Pennsylvania court advanced the follow-

ing rationale to distinguish between materialmen and architects, engineers and contractors.

> . . .[T]he distinction drawn between the two classes is rational. Suppliers who typically produce items by the thousands can easily maintain high quality control standards in the controlled environment of the factory. A builder on the other hand, can pre-test his designs and construction only in limited ways - actual use in the years following construction is the only real test. Further, every building is unique and far more complex than its component parts.
>
> ★ ★ ★ ★ ★ ★
>
> The legislature can rationally conclude that the conditions under which builders work are sufficiently difficult that limitations should be placed on their liabilities but not on the liabilities of suppliers.

Id. at 719.

We cannot accept this conclusion. The high quality of control in the factory ends at the factory gates. Once a material supplier's goods are taken to the site and incorporated into the structure, the supplier is at the mercy of those who construct, maintain and control the property. Suppliers assume the exact risks of the protected class yet receive no protection under KRS 413.135. *See Phillips* v. *ABC Builders, Inc., supra,* at 830. It is the identical nature of the risk that

the separate, but similarly situated, groups are exposed to and not the conditions under which they work that is controlling. Architects, engineers, and contractors all are licensed professionals who undergo extensive technical training solely for the purpose of dealing with the unique nature of the structures they design and construct. We fail to see any rational basis for distinguishing them from suppliers or materialmen whose products, while uniform, are incorporated into unique structures, thus becoming uniquely used and placed under the control of third party owners and tenants. For further criticism of *Freezer Storage, supra, See Loyal Order of Moose Lodge 1785, supra,* at 147.

We do not stand alone in this conclusion. The absence of any rational distinction between the above groups has often been noted. In *Skinner* v. *Anderson, supra,* at 591, the court in a frequently quoted passage states that,

> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement.

> But if construction for which an architect or contractor was responsible, immunity is granted. It can not be said that the one event is more likely than the other to occur within four years after construction is completed.

We believe this reasoning to be sound. We join in this view and now reverse.

The judgment of the Fayette Circuit Court is reversed and this cause is remanded for further proceedings consistent with this opinion.

HAYES, CHIEF JUDGE, CONCURS.

HOWARD, JUDGE, DISSENTS.

HOWARD, JUDGE, DISSENTING: I respectfully dissent from the majority opinion because the "equal protection of the laws" argument was not preserved for review. This issue was never raised before the trial court, and under well-considered and long-standing precedents, it cannot be considered for the first time on appeal. *Pittsburg and Midway Coal Mining Co.* v. *Rushing*, Ky., 456 S.W.2d 816 (1969); *Akers* v. *Floyd County Fiscal Court*, Ky., 556 S.W.2d 146 (1977). Therefore, I would affirm the judgment of the trial court.

ATTORNEY FOR APPELLANT:

Peter Perlman
PERLMAN & GARMER, P.S.C.
388 South Broadway
Lexington, Kentucky 40508

ATTORNEYS FOR APPELLEES:

David L. Armstrong
Attorney General
Capitol Building
Frankfort, Kentucky 40601

Calvin R. Fulkerson
Ronald Green
W. T. Adkins
710 First National Building
Lexington, Kentucky 40507

Robert H. Measle
Suite Four-A
Citizens Bank Square
Lexington, Kentucky 40507

James Carroll
109 Short Street
Harrodsburg, Kentucky 40330

APPENDIX E

JUNE 30 1983

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE, Individually PLAINTIFFS

VS: NO. 81-CI-1066

SUMMARY JUDGMENT

HARLEY HOTELS, INC., RUSSELL
HALCOMB, WILLIAM B. TABLER
ARCHITECT, and DOVER ELEVATOR
COMPANY DEFENDANTS

* * * * * *

This Cause coming on to be heard upon Motion of the Defendants, WILLIAM B. TABLER, Architect, and DOVER ELEVATOR COMPANY, for a Summary Judgment in their favor on all claims of the Plaintiff, MARY L. WALLACE, Administratrix of the Estate of WILLIAM WALLACE, and MARY L. WALLACE, Individually, as asserted against said Defendants; arguments of counsel having been heard; Memoranda of Law submitted by the parties having been considered by the Court; the Court having entered its Opinion in this matter on June 22, 1983, sustaining said Motion for Summary Judgment on behalf of both of the above

named Defendants, which said Opinion is incorporated herewith and made a part of this Judgment; and the Court being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that the Complaint of the Plaintiff, MARY L. WALLACE, Administratrix of the Estate of WILLIAM WALLACE, and MARY L. WALLACE, Individually, be dismissed with prejudice as against said Defendants, WILLIAM B. TABLER, Architect, and DOVER ELEVATOR COMPANY, and that the Plaintiff take nothing thereby;

IT IS FURTHER ORDERED AND ADJUDGED that said Defendants recover of the Plaintiff their costs herein expended.

THE COURT FURTHER ORDERS AND ADJUDGES that there is no just reason or cause for delay, and that this is a Final and Appealable Judgment.

/s/ James H. Keller
JUDGE, FAYETTE CIRCUIT COURT

A True Copy
ATTEST
FAYETTE CIRCUIT COURT
/s/ S. Oden Deputy
Dated: 6-30-83

PREPARED BY:

FOWLER, MEASLE & BELL
By: /s/ Robert H. Measle
ATTORNEYS FOR DEFENDANT,
DOVER ELEVATOR COMPANY

It is hereby certified that true copies of the foregoing Summary Judgment have been served by mail upon the following attorneys of record for the parties herein, this the 30 day of June, 1983:

William R. Garmer, Esq.
PERLMAN & GARMER, P.S.C.
ATTORNEYS FOR PLAINTIFFS

James S. Carroll, Esq.
ATTORNEY FOR DEFENDANTS,
HARLEY HOTELS, INC. and
RUSSELL HALCOMB

* * * * * * *

APPENDIX F

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
FILE NO. 83-CA-2160-MR

MARY L. WALLACE, Administratrix
of the Estate of WILLIAM WALLACE,
and MARY L. WALLACE,
Individually PLAINTIFF/APPELLANT

VS:

WILLIAM B. TABLER, Architect,
and DOVER ELEVATOR
COMPANY DEFENDANTS/APPELLEES

AND

HARLEY HOTELS, INC., and
RUSSELL HALCOMB DEFENDANTS

NOTICE OF INTENT NOT TO INTERVENE

Comes now the Commonwealth of Kentucky, by counsel, and hereby acknowledges receipt of the Notice of Appeal and the Brief in the above-styled action, and further informs this Court and the parties hereto that the Attorney General does not intend to intervene.

peal was entered in this Court and a true copy thereof was mailed to the following:

Hon. James S. Carroll
Mercer Federal Annex
109 Short Street
Harrodsburg, Kentucky 40330

Hon. Calvin R. Fulkerson
710 First National Building
Lexington, Kentucky 40507

Hon. Robert H. Measle
Suite Four A
Citizens Bank Square
Lexington, Kentucky 40507-1680

Hon. James E. Keller
Judge Fayette Circuit Court
First Division
Fayette County Courthouse

Hon. John C. Scott, Clerk
Court of Appeals of Kentucky
Bush Building
403 Wapping Street
Frankfort, Kentucky 40601

on this 15th day of July, 1983.

/s/Robert M. True by Warren Smith
ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

trial court's final and appealable Order and Judgment granting the Defendants, William B. Tabler, Architect, and Dover Elevator Company's Motion for Summary Judgment entered by this court on June 30, 1983.

The names of the appellees in the action are: Defendant-Appellee, William B. Tabler, Architect, and, Defendant-Appellee, Dover Elevator Company.

PERLMAN & GARMER, P.S.C.
388 SOUTH BROADWAY
LEXINGTON, KENTUCKY
40508

A TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT
BY: Paula Smith Deputy

BY:/s/ Peter Perlman
PETER PERLMAN

NOTICE OF ENTRY
AND CERTIFICATION OF SERVICE

I, Robert M. True, Clerk of the Fayette Circuit Court, hereby certify that the foregoing Notice of Ap-

APPENDIX G

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL PROVISIONS INVOLVED

U.S. CONSTITUTION, FOURTEENTH AMENDMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY RULES OF CIVIL PROCEDURE

CR 24.03

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the General Assembly affecting the public interest is drawn in question in any action to which the State or an officer, agency, or employe thereof is not a

party, the movant shall serve notice of the motion upon the Attorney-General.

CR 46

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

KENTUCKY STATUTES

KRS 418.070

Necessary parties - Notice to attorney general. -When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a statute, the attorney general of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the petition and be entitled to be heard.